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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CARPENTERS LOCAL 209,
Petitioner,

v.

ANHEUSER-BUSCH, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the Norris-LaGuardia Act, 29 U.S.C. § 101 et seq., and the First Amendment prior restraint doctrine preclude preliminary relief, issued before any trial on the merits of plaintiff's claims or any final determination of the legal validity of those claims, broadly enjoining on the basis of its content peaceful speech publicizing a labor dispute?

2. On the independent review of the record mandated by this Court for cases implicating free speech interests, particularly during a labor dispute, does the record support the conclusion that the Union's banner, which was literally true according to the dictionary definitions of the words used, was nonetheless so misleading as to be false and unprotected by the First Amendment?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Carpenters Local 209, the defendant in the district court and the appellant in the court of appeals, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *Anheuser-Busch, Inc. v. Carpenters Local 209*, 9th Cir. No. 97-56305, entered on February 27, 1998.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Ninth Circuit, issued on February 27, 1998, is not reported. It appears in Appendix B hereto, at pp. 3a-4a. The opinion of the United States District Court for the Central District of California, issued on September 17, 1997, is unreported and is printed in Appendix C, at pp.

5a-11a. The District Court's temporary restraining order, issued on September 10, 1997, is also unreported and appears in Appendix D, at pp. 12a-13a.

The divided panel decision of the Ninth Circuit in a related case, *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997), dispositively relied upon by both the district court and the Ninth Circuit in this case, issued on September 8, 1997, is reprinted in Appendix E, at pp. 14a-32a. A divided Ninth Circuit decision denying the suggestion for rehearing en banc in *San Antonio Community Hospital*, filed on February 17, 1998, is reported at 137 F.3d 1090 (9th Cir. 1998) and is reprinted in Appendix F, at pp. 33a-42a.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on February 27, 1998. On May 20, 1998, Justice O'Connor extended the time within which to file the petition for writ of certiorari to June 27, 1998. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in Appendix G to this Petition, at pp. 43a-46a.

STATEMENT OF THE CASE

1. *Facts*: Petitioner Carpenters Local 209 ("the Union") is embroiled in a labor dispute with Respondent, Anheuser-Busch, Inc., ("the Company" or "Budweiser") and one of its contractors, H.M.S., Inc. That dispute stems from Budweiser's replacement of a union contractor performing construction work at one of its breweries. The union contractor's collective bargaining agree-

ment met state-determined prevailing wage and benefit standards. H.M.S. did not meet those area labor standards. App. 6a.

To publicize its dispute, the Union, beginning on August 5, 1997, posted banners in front of the brewery at which H.M.S. was performing construction work.[1] The banners were worded in such a way as to attract attention to, and dramatically underscore, the Union's disagreement with the Company's use of nonprevailing wage contractors. The two 20 x 5 foot stationary banners stated: in 12-inch, red letters "*Budweiser* HAS RATS"; in 6-inch, black letters "IN THEIR BREWERY"; and in 5-inch letters "LOCAL #209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S." with the words "Local #209 labor dispute with" in black letters and the words "rat contractor H.M.S." in red letters. App. 1a. There was no violence, confrontational conduct or patrolling associated with the stationary banner displays.

The Union used the word "rats" on its banners in a well-established sense, customary in labor disputes for more than a century. Numerous dictionaries define the word "rat" as an employer who is not paying its workers the prevailing wage, as well as employees working for less than the prevailing wage. App. 29a.

The Union's activities took place against the background provided by the Ninth Circuit's first opinion—later substantially revised—in *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 115 F.3d 685 (9th Cir., June 4, 1997). *San Antonio* upheld an injunction against a banner that used the term "rat" in that same sense as the banners in this case—to communicate with the public concerning the Union's dispute with

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[1] For two days—July 23, and July 24, 1997—the Union picketed the brewery. On the second day, Anheuser-Busch obtained a state court injunction restraining certain picketing activities allegedly in violation of state law. All picketing stopped on that day.

an employer.[2] The *San Antonio* opinion stressed that the banner in that case "[did] not identify Best Interiors as the 'rat contractor' "; contained explanatory language only in a hard-to-read location on the banner near the feet of the individuals holding it; and identified the contractor only in two-inch handwritten letters that were "as a result, difficult to read at best by drivers passing by." 115 F.2d at 690.

In this instance, therefore, the Union used banners twice as long and a foot taller than those in *San Antonio Community Hospital*; clearly identified H.M.S. as the "rat contractor," thereby indicating the sense in which the term was used on the banner; and used much larger letters than in *San Antonio*, printed rather than handwritten, for the name of the contractor.

2. *Proceedings*: On August 6, 1997, Respondent sought an injunction in state court against display of the banners on the ground that the banners were fraudulent. The Los Angeles Superior Court, however, found that "the word 'rats' is subject to two meanings, one of which is a crude reference to the brewery mangement, agents, etc. in this hotly contested labor dispute." Ninth Circuit Excerpts of Record (ER) 8, pp. 1-2. The state court concluded to "enjoin such free speech would be inappropriate under the circumstances." *Id.*

Almost a month later, on September 4, 1997, Respondent filed an *Ex Parte* Application for a Temporary Restraining Order (TRO) in federal district court, alleging claims of trademark infringement and trademark dilution under the Lanham Act, 15 U.S.C. § 1125, and a common

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[2] The banner in *San Antonio Community Hospital* publicized a dispute with a hospital concerning its hiring of a nonprevailing wage contractor. It read "This Medical Facility is Full of Rats. Carpenters L. U. 1506 has a dispute with Best Interiors for failing to Pay Prevailing Wages to Its Workers." After the injunction issued, the union in that case added a second banner stating "Best Interiors is the Rat Contractor," and the district court held the two banners together permissible under the injunction.

law claim for fraud. App. 6a. The Union promptly submitted pleadings contending that no injunction could issue under the Norris-LaGuardia Act (NLA), 29 U.S.C. §§ 101-115.

The district court, however, refused to consider, before issuing the TRO, the Norris-LaGuardia Act jurisdictional prerequisites for granting any injunction in a labor dispute. Placing dispositive reliance on the Ninth Circuit's decision in *San Antonio Community Hospital* (refiled in its revised form on September 8, 1997), the district court, within six days of Anheuser-Busch's filing, issued a TRO. That restraining order enjoined the Union from:

> using [Respondent's] registered "Budweiser" trademark in an advertisement or sign exhibited to the public, disparaging the purity of [Respondent's] product, and expressly or impliedly representing by word, sign, or action, the false notion that the Van Nuys facility has a rodent or any other loathsome problem [or] . . . using the term 'Rats' as they currently have in their banner display in front of [Respondent's] facility. [App. 13a.]

At the hearing on a preliminary injunction five days later, on September 15, 1997, the district court began by stating: "Gentlemen, this proceeding is going to be short and sweet. I don't need to hear any evidence on the case. I'm convinced the injunction should issue." ER 18, p.3.[3] The Union had, in its papers, raised once again the NLA procedural requirements as a bar to injunctive relief, including particularly the provision that: "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or

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[3] The parties had, at the court's request, submitted summaries of proposed testimony that they were prepared to offer through live witnesses. The proposed testimony was not, however, submitted under oath; was not, or course, subject to cross-examination; and did not give the opposing party an opportunity to present rebuttal testimony. And there had, of course, been no opportunity for discovery in the short time since the case was filed.

growing out of a labor dispute . . . except after hearing the testimony of witnesses in open court (with opportunity for cross-examination)". (29 U.S.C. § 107(a)). Nevertheless, when the Union invoked the Norris-LaGuardia Act's jurisdictional provisions at the hearing, the judge reiterated that "I don't need witnesses to convince me," ER 18, p. 6, and refused to hear any testimony whatsoever.

Two days later, the district court issued an order granting a preliminary injunction identical to the TRO. App. 11a. The court did not find that the banners were illegible, in whole or part, to passersby, nor did the district court note the differences between the banner in *San Antonio Community Hospital* and the banners in this case. Rather, the court simply concluded that because the Company had no rodents in its facility, the Union was not "advertising facts," but was "advertising falsehoods and their methods involve fraud." App. 7a. And on that basis the district court determined, following *San Antonio*, that the provision of the Norris-LaGuardia Act prohibiting the issuance of an injunction against "[g]iving publicity to the existence of, or the facts involved in, any labor dispute . . . by any method not involving fraud or violence," (29 U.S.C. § 104(e)) did not preclude injunctive relief.

The district court did not address the First Amendment issues raised by the Union as precluding any injunction. As to the required NLA finding "[t]hat as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief," (29 U.S.C. § 107(c)), the district court gave no weight whatever to the Union's interest in expressing its message concerning the labor dispute in the terms that it chooses, so as to convey its position on the subject to the public in a manner likely to be noticed and read. Rather, the court viewed the sole injury to the Union as the "slight inconvenience and insubstantial economic cost of produc[ing] Defendant's existing banners and replacement banners." App. 8a.

Finally, although the NLA requires a finding that the Union's actual or threatened actions *are* "unlawful" (29 U.S.C. § 107(a)), the district court found only "*probable* success on the merits of the claim for fraud and dilution," (App. 10a, emphasis supplied), and addressed the legal issues in a perfunctory manner. The court made no findings on the elements of common law fraud (and the Company conceded on appeal that its allegations would not establish an action for common law fraud (Answering Brief of Appellee Anheuser-Busch, Inc., at 39)).[4]

On the Lanham Act causes of action, the district court held that the Company had not made out a claim under 15 U.S.C. § 1114(a), because there was no showing of a likelihood of confusion. On the claim under 15 U.S.C. § 1125(c), however, providing for "an injunction against another person's commercial use in commerce of a mark or trade name," the court found a likelihood of injury to business reputation. The court did *not*, though, address the critical question whether the Union's use of Budweiser's tradename on its banners only in the course of commenting on the Company's actions—a use of a company name that is nearly inevitable in any protest seeking to bring to the attention of the public actions by a company of which the speaker disapproves, in order to persuade the public to the speaker's disapproving view—was a "commercial use in commerce," as defined under the statute. *See* 15 U.S.C. § 1127 (defining "use in commerce" as use to further the sale or advertising of goods or services.); 15 U.S.C. § 1125(c)(4) (§ 1125(c) does not apply to "[n]oncommercial use of a mark.").

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[4] In particular, there was no allegation or proof, nor could there be, that the Company, the only plaintiff, relied upon the Union's supposed representations concerning rodents. *See, e.g., Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 1108 (1988) (justifiable reliance to the plaintiff's detriment is an element of common law fraud). Obviously, the Company was in a much better position than the Union to know whether or not there were rodents in the Budweiser plant.

On September 24, 1997, the Union timely filed a notice of appeal of the "Budweiser" preliminary injunction. While that appeal was pending, the Ninth Circuit, on February 17, 1998, over the strong dissent of four judges, denied a petition for rehearing and suggestion for rehearing en banc in *San Antonio Community Hospital.*

Ten days later, on February 27, 1998, a Ninth Circuit panel, without holding oral argument, issued a three paragraph *per curiam* opinion in this case summarily upholding the issuance of the "Budweiser" injunction. The Ninth Circuit ruled simply that the district court "did not rely on an erroneous legal premise or abuse its discretion in concluding that appellee's showing of probable success on the merits and the possibility of irreparable injury was sufficient," citing *San Antonio Community Hospital*; and that, because "the court's factual findings regarding appellant's display of the controversial banner are not clearly erroneous," the case comes within the fraud exception to the Norris-LaGuardia Act prohibition on enjoining speech during a labor dispute, again citing *San Antonio.* App. 3a-4a.[5]

3. *The San Antonio Community Hospital Case*: To fully understand the background of this case, some further attention to the Ninth Circuit's decision in *San Antonio* is helpful.

In *San Antonio,* a divided panel recognized that "the term 'rat' " has "deep historical meaning in the context of labor disputes," included in most dictionaries' entries on the word "rat". App. 22a. And the Ninth Circuit recognized as well that under this Court's decisions in *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53 (1966) and *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 283

[5] The Ninth Circuit did not mention various NLA procedural issues raised by the Union, although those issues were extensively briefed to the court of appeals.

(1984), the federal labor laws "give[] a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an ineffective means to make its point," (*Letter Carriers*, 418 U.S. at 283). App. 21a. Nonetheless, the Ninth Circuit concluded that the injunction was proper under both the Norris-LaGuardia Act and the First Amendment, because "the language on the Union's banner crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentations of fact." App. 25a.

Judge Kozinski dissented, stressing that "[t]hose who would enjoin speech concerning a matter of public interest must bear a heavy burden . . . more so if the speech in question concerns a labor dispute," and that there was no proof on the record in that case—as there certainly is not in the Budweiser case at hand, since there is no record to speak of—"that a single person was actually deterred by the sign" from trading with the employer. App. 30a. And Judge Kozinski went on to highlight the unprecedented nature of the Ninth Circuit's decision:

> Not only is this the first case to affrm a labor injunction, it is the first case ever (so far as I am aware) to uphold a preliminary injunction against speech covered by [*New York Times v. Sullivan*, 376 U.S. 254 (1964)]. Because *Sullivan* speech always involves matters of public interest, I had assumed that damages after trial on the merits is the high water mark of available relief. [App. 31a-32a.].

Five months after the revised opinion issued in *San Antonio*, the Ninth Circuit denied the suggestion for rehearing en banc, with four judges recording their dissent from the denial. The dissent concluded that enjoining the banner could not be squared with either the Norris-LaGuardia Act or the First Amendment:

> [I]n passing the Norris-LaGuardia Act, 'Congress was intent on taking the federal courts out of the

> labor injunction business.' *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960). . . . [T]his court's . . . unfortunate and unprecedented decision . . . get[s] back into that business in order to regulate traditional, robust labor speech, in violation of the clear mandate of not only our national labor laws but of our fundamental First Amendment doctrine as embodied in *New York Times v. Sullivan.* [App. 42a (Reinhardt, J., dissenting).]

REASONS FOR GRANTING THE WRIT

In *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988), this Court described the advertisements for Campari Liquor, a parody of which was at the center of that intentional infliction of emotional distress case, as follows:

> [T]he ads . . . included interviews with various celebrities about their "first times." Although it was apparent by the end of each interview that this meant the first time they sampled Campari, the ads clearly played on the sexual double entendre of the general subject of "first times." [485 U.S. at 48.]

The banners in this case, and in the *San Antonio Community Hospital* case, its predecessor in the Ninth Circuit, used the same familiar technique of beginning a message with a double entendre—a word with two meanings—to attract attention to a message. The remainder of the message in this case used the term "rat" in an accepted, albeit metaphorical, sense, to communicate in a short-hand fashion both the reason for the Union's dispute with the Company and the depth of the Union's feeling regarding that dispute.[6]

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[6] One of the generally accepted definitions of the term "rat" is "[a] workman who refuses to strike along with others, or takes a striker's place; also (esp. among printers), one who works for lower wages than ordinary (or trade-union) rate." 13 The Oxford English Dictionary 205 (2d ed. 1989) (emphasis added). *See also*, Webster's Third New International Dictionary 1884 (unabridged ed. 1986) (defines "rat" as: "(1): a printer who works for less than the established or prevailing rate of pay (2): a scab,");

Whether the Union's overall message, despite its literal truth and use of a common rhetorical device for attracting attention to one's message, was so false or misleading as to come within the "fraud" exception to § 4(e) of the Norris-LaGuardia Act and fall beyond the First Amendment's protection of freedom of speech remains at this juncture a matter of dispute in this case. For, there has been no trial on the question, and therefore no final decision.

The district court here nonetheless enjoined the Union's use of its banner, and imposed other, more general restraints on the Union's speech concerning its labor dispute with Anheuser-Busch. And the district court did so, as we show below, in direct contravention, both of (1) the explicit terms of the Norris-LaGuardia Act, enacted as an "extraordinary step . . . to remedy an extraordinary problem" . . . the pattern of injunctions entered by federal judges" (*Burlington No. R. Co. v. Bhd. of Maintenance of Way Employes*, 481 U.S. 429, 437-38 (1987)), by " 'express[ing] a basic policy against the injunction of activities of labor unions' " (*id.* at 437, *quoting Machinists v. Street*, 367 U.S. 740, 772 (1961)); and (2) this Court's First Amendment prior restraint cases, precluding injunctions prohibiting speech in advance of its utterance,

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Ballantine's Law Dictionary, at 1055 (3d ed. 1969) (defining the term "rat" in a labor union context as a "scab.")

This usage of the term "rat" is a venerable one. As early as 1816, the Albany printers society used "the odious appellation of 'rat' " to refer to "a workman who accepted wages lower than the rate." George A. Stevens, *New York Typographical Union No. 6* 50, n.3 (1913). *See also id.*, at 143 (describing the "preparation and distribution of 'rat' circulars" in New York City as early as 1831); George A. Tracy, *History of The Typographical Union No. 56* 118 (1913) ("Keeping a registry of the names of 'rats' and other unworthy members of the trade, and description of their persons, to be sent to every union or society in the country and to be kept by each union for reference."); 13 The Oxford English Dictionary 205 (2d ed. 1989) (dating use of term "rat" in above context to 1824).

and, where it is claimed that particular speech is outside the First Amendment's protections, proscribing any injunctions curbing that speech in advance of a final determination that that speech is in truth unprotected. (*Near v. Minnesota*, 283 U.S. 697, 713-14 (1931); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308 (1980) (*per curiam*); *Fort Wayne Books v. Indiana*, 489 U.S. 46, 63-64 (1989)).

The Ninth Circuit, moreover, rather than correcting the district court's manifest errors, treated the district court's rulings deferentially, as if the case involved an ordinary preliminary injunction and not a prior restraint on speech. The court of appeals thereby failed entirely to perform the "special responsibility on judges whenever it is claimed that a particular communication is unprotected" to make "an independent examination of the allegedly unprotected material [so as] to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Bose Corp. v. Consumer Union*, 466 U.S. 505, 507-08 (1984); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976).

What this case is about, then, is whether the Norris-LaGuardia Act and the First Amendment prior restraint doctrine—as well as the First Amendment independent examination requirement—are to be scrupulously applied so as to avoid judicial censorship of speech, rather than honored in the breach and ignored when most essential. Otherwise, as this case shows, the likely result is fatally compromising free speech during labor disputes, and free speech generally. For the NLA and the prior restraint doctrine are both intended to assure that federal judges do not, as the district court judges in this case and in *San Antonio Community Hospital* did, apply their personal sensibilities and find falsehood "when they see it," (*cf. Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)), rather than submitting the issue of truth or falsehood to reasoned legal analysis on a complete record and, where appropriate, to jury determination.

The Ninth Circuit has now approved just such cavalier judicial suppression of speech not once but twice, in rapid-fire succession.[7] In his dissent to the panel opinion in the *San Antonio Community Hospital* case, Judge Kozinski foresaw—even before the Ninth Circuit's second approval of judicial censorship in this case—that the approval of one speech-suppressing injunction would lead to a second and a third and to an inevitable downward spiral in the protection of labor speech, and of speech generally:

> This may not seem like a big deal. Who, after all, can object to forcing the union to change its banner so as to avoid even a small risk of deceiving the public? But ambiguity and flamboyance are often at the heart of political expression. Who, for example, can forget "Where's the Beef" from the 1984 Presidential campaign? But what is Senator Mondale had been forced to say: "Where's the substance?" No one would have noticed or remembered.
>
> So too with rats. Changing the sign may make it clearer, may avoid the smallest risk of confusion, but it saps the message of its vigor. . . . I don't believe courts are equipped—or even permitted to—evaluate such trade-offs. Because the sign here was literally true, within an accepted meaning of the word used, I would quash the injunction and let the parties work out their differences in the marketplace—and in the marketplace of ideas. . . .
>
> Since labor speech enjoys even greater protection than ordinary speech, today's opinion will provide plausible support to those who seek prior restraints against allegedly defamatory newspaper and magazine articles, as well as television programs, plays, and

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[7] The Sixth Circuit has also, it appears, lost sight of the firm NLA and First Amendment procedural protections against preliminary injunctions restraining labor speech. *See Mercy Health Services v. Local 1199 National Health and Human Service Employees Union*, 888 F. Supp. 828 (1995), stay of preliminary injunction denied, Sixth Circuit No. 95-1214 (Mar. 23, 1995).

> movies. Indeed, given the wafer-thin [legal] claim here, and the paltry evidence of irreparable harm, getting a preliminary injunction against speech offensive to public officials and other VIPs may not be all that hard. [App. 31a-32a.]

With Judge Kozinski, we submit that the time to stop this erosion of free speech rights is *now*, and that this Court should grant certiorari in this case and order the Ninth Circuit to vacate the injunction against free speech here.

I. The Norris-LaGuardia Act and the First Amendment Prior Restraint Doctrine Preclude Preliminary Injunctions Against Peaceful But Allegedly False Labor Speech.

Congress, in enacting the Norris-LaGuardia Act in 1932 and this Court, in the long series of prior restraint cases beginning with its *Near v. Minnesota* decision in 1931, have determined that federal courts must take the greatest care to avoid judicial injunctions against constitutionally protected speech, including, particularly, speech during labor disputes. The NLA and this Court's prior restraint cases spell out a set of procedural protections that guard against judicial censorship of peaceful, constitutionally protected speech activity. The Ninth Circuit in this case countenanced the violation of each of those legislative and judicial speech-protective procedural requirements.

A. The Norris-LaGuardia Act: The Norris-LaGuardia Act was enacted because of concern that the federal judiciary's use of its injunctive power was determining the outcome of labor disputes. *See generally* Frankfurter & Green, *The Labor Injunction* (1930). "The legislative history [of the NLA] is replete with criticisms of the ability of powerful employers to use federal judges as 'strike-breaking' agencies." *Jacksonville Bulk Terminals v. Longshoremen, supra,* 457 U.S. 702, 716 (1982). And, the Act's "language is broad because Congress was intent upon taking the federal courts out of the labor injunction business except in . . . very limited circumstances." *Bur-*

lington No. R. Co., supra, 481 U.S. at 441, *quoting Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960).

In *San Antonio Community Hospital* and this case, the Ninth Circuit has sanctioned a return to the labor injunction era in the federal courts. Anheuser-Busch—turned down in an attempt to obtain an injunction from a state court—filed suit in federal court and, in ten days, obtained an injunction with no finite duration censoring the Union's free expression during its labor dispute with the Company. For three reasons, the injunction violated and continues to violate the NLA:

First, Section 7 of the Norris-LaGuardia Act, in the plainest language, requires a live hearing before a district court may issue *any* injunction in a labor dispute:

> No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute . . . except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) . . . and testimony in opposition thereto . . . [29 U.S.C. § 107].

The purpose of the live hearing requirement is to prevent "not the least of the evils that led to the Norris-LaGuardia Act, . . . the frequent practice of issuing labor injunctions upon the basis of affidavits rather than after oral proof presented in open court." *Eccles v. People's Bank of Lakewood Village, Cal.*, 333 U.S. 426, 434 (1948).

In this case, the district court flatly refused to hear any live witnesses. Without any live testimony regarding the visibility of the banner as a whole, the understanding by actual viewers of the banner as to whether there was a rodent infestation or a labor dispute at the brewery, *any* impact on the Company's sales or other injury, irreparable

or otherwise, to the Company, or any less speech-restrictive way to clear up any possible misunderstanding (such as posting of an explanatory banner by the Company), the district court issued a preliminary injunction. And, despite lengthy briefing on the question (Opening Brief of Appellant Local 209 at 47-51), the Ninth Circuit, in its summary opinion, did not deem this blatant statutory violation even worthy of mention.[8]

Second, before an injunction can issue, the NLA requires a finding, *inter alia*, "that unlawful acts . . . have been committed and will be continued unless restrained . . ." NLA § 7(a), 29 U.S.C. § 107(a). Here, the district court did not find that any of the Union's acts *were* unlawful, but only that "[p]laintiff has shown *probable success* on the merits of the claims for fraud and dilution," App. 10a (emphasis supplied). And the Ninth Circuit did not review even that tentative conclusion on the merits, but determined that the district court had not "abuse[d] its discretion" in so concluding. App. 4a.

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[8] This Court has never addressed the question whether there are any circumstances in which a live hearing need not be held before issuing an injunction affecting a labor dispute. For the most part, the courts of appeal have strictly applied the requirement, reversing injunctions covered by NLA § 7 when no live hearing was held. *See, e.g., Tejidos De Coamo, Inc. v. ILGWU*, 22 F.3d 8, 14-15 (1st Cir. 1994); *District 17, United Mine Workers of America v. A&M Trucking, Inc.*, 991 F.2d 108, 111 (4th Cir. 1993); *United Telegraph Workers v. Western Union*, 771 F.2d 699 (3rd Cir. 1985); *In re District No. 1-Pac. Coast Dist. Marine Eng'rs' Beneficial Ass'n*, 723 F.2d 70 (D.C. Cir. 1983); *International Union UAW v. LaSalle Machine Tool*, 696 F.2d 452, 457 (6th Cir. 1982). The Second, Fifth and Seventh Circuits, however, have held or suggested that in very limited circumstances failure to comply with the live hearing requirement may not be reversible error. *See, Local Lodge No. 1266 v. Panoramic Corp.*, 668 F.2d 276, 290-291 (7th Cir. 1981); *Drywall Tapers and Pointers v. Operative Plasterers' and Cement Masons' Int'l Ass'n*, 537 F.2d 669, 674 (2d Cir. 1976); *Fish v. Pepsico, Inc.*, 491 F.2d 556, 560 (2d Cir. 1974).

That failure to consider on their merits the extremely serious issues the Union raised concerning the legal viability of the Company's complaint on its merits was far from harmless. The briefest reflection is sufficient to demonstrate that the legal claims the district found to be probably meritorious are in fact entirely without merit.

The Company in fact *conceded* in the court of appeals that it could not sustain a cause of action for common law fraud. While the district court found otherwise, that court did not address in any way the constituent elements of the fraud claim. App. 10a. And although the Company maintained on appeal that there were other state law claims that could be established on the facts of this case, fraud is the only state claim alleged in the complaint, and neither the district court nor the court of appeals determined that any other state law claim had been made out.

As to the Lanham Act dilution claim, the 1996 amendment to the Lanham Act permitting injunctive relief for dilution applies *only* to "commercial use in commerce" of a trademark, and contains an express exception for "[n]on-commercial use of a mark." 15 U.S.C. § 1125(c). Because the Union was not selling, advertising, or transporting any goods or services but, instead, was criticizing the Company's contracting practices, the Union's identification of the Company's product by its tradename was not a "use in commerce" as that term is defined in the statute. 15 U.S.C. § 1127 (defining "use in commerce").[9]

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[9] The only opinion of which we are aware addressing on its merits the question whether the use of a trade name in a union communication to the public concerning the issues in a labor dispute simply to identify a product of the employer with whom there is a dispute is a "use in commerce" under 15 U.S.C. § 1127 has concluded that it is not. *WHS Entertainment Ventures v. United Paperworkers International Union*, 1998 WL 119606, *3 (M.D. Tenn. Mar. 11, 1998). *Cf. International Association of Machinists v. Winship Green Nursing Center*, 103 F.3d 196, 209 (1st Cir. 1996) (Saris, J., concurring).

Moreover, by providing that only "*commercial* use in commerce" is covered (29 U.S.C. § 1125(c) (emphasis supplied)) and including the "noncommercial use" proviso, Congress specifically intended to make clear that only "commercial speech" can be enjoined.[10] This Court has never held that peaceful speech publicizing a labor dispute is "commercial speech." Rather, the Court has stressed that "the [peaceful] dissemination of information concerning the facts of a labor dispute [is] . . . within that area of free discussion that is guaranteed by the Constitution." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940), and that therefore federal statutes regulating expression are to be construed so as not to reach labor speech that does not involve picketing or patrolling, to avoid raising "serious constitutional issues." *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575-76 (1988).

Since the 1996 Lanham Act amendments do not require any finding of fraud and permit injunctions without regard to the truth or falsity of the speech in question, the holding below that the Act applies to the Union's activity would suggest that *any* appeal to the public by a union (or any other protest group) disparaging a product described by its famous "mark or trade name" could come within the Lanham Act ban on dilution. To state that proposition is to refute it.

That the district court nonetheless issued the injunction on such flimsy legal grounds and was upheld by the court

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[10] The House Report on the 1996 Dilution Act provides that "§ (4)(B) of the bill expressly incorporates the concept of 'commercial' speech from the 'commercial speech' doctrine," concluding that "[n]othing in this section of the bill is intended to alter existing case law on the subject of what constitutes 'commercial' speech." H.R. Rep. No. 104-374 (Nov. 30, 1995). *See also* 141 Cong. Rec. S19310 (daily ed. Dec. 29, 1995) (remarks of Sen. Hatch) (the Dilution Act exempts "forms of expression that are not part of a commercial transaction,"). *See generally* J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 24:97, pp. 24-157 to 24-158 (1996).

of appeals in so doing demonstrates that issuing injunctions against speech in labor disputes prior to a complete, deliberate consideration of the factual and legal issues raised is, now as in 1932, likely to lead to curbs on speech that, on due and careful consideration, cannot be legally justified.

Third, NLA § 4 provides:

> No court of the United States shall have jurisdiction to issue any . . . temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons . . . from . . . (e) [g]iving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence. [29 U.S.C. § 104.]

And § 7(c), 29 U.S.C. § 107(c), requires that before any injunction can issue involving a labor dispute, there must be a finding that "greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief."

In upholding the injunction in this case (and in the *San Antonio Community Hospital* case), the Ninth Circuit applied the "fraud" exception exceedingly broadly, to encompass the use of an accepted and traditional, albeit metaphorical and highly critical, epithet. And the court of appeals upheld an injunction issued on hasty, preliminary consideration, and without giving *any weight at all* in balancing the equities to the fact that the injunction, while purporting to leave the Union free to communicate its message regarding its dispute with Budweiser, would "sap[] the message of its vigor," (App. 31a). *See* App. 8a (considering the Union's only injury to be the cost of producing a new banner).

The drafters of the NLA however, intended to *include* within the NLA's injunction prohibitions bans on "abusive . . . annoying . . . indecent . . . [and] 'bad' language—and against specific words such as 'scab', 'traitor', [and]

'unfair'." Frankfurter & Green, *supra*, at 98; *see also id.* at 115 n.132 (citing the term 'rat' as a usage improperly enjoined.) And, as the Eighth Circuit held long ago, the NLA's sweeping ban on enjoining speech during a labor dispute suggests a very narrow scope for the "fraud" exception:

> Expressions of opinion, though inaccurate and even misrepresentative in character, obviously cannot be permitted to be made the basis ordinarily for injunctive process in a labor dispute. . . . In effectuating the purpose of the Act . . . the exceptions which have been left open to injunctive process may not be treated lightly, or as if the Act had never been passed, but should be viewed restrainedly, as a narrow field of permissive jurisdiction, exercisable in the interest of a public policy co-ordinate with that aspect upon which the prohibitions of the statute rest. [*Ironworkers v. Pauly Jail Bldg. Co.*, 118 F.2d 615, 616-17 (8th Cir. 1941), *cert. denied*, 314 U.S. 639 (1941).]

See also Wilson & Co. v. Birl, 105 F.2d 948, 952 (3rd Cir. 1939) ("Carrying signs stating that Wilson & Co. was unfair to organized labor may have been misrepresentative. It was not fraudulent."); *Marriott Corp. v. Great America Service Trades Council*, 552 F.2d 176, 180 (7th Cir. 1977) (recognizing that the NLA does not permit a preliminary injunction banning an advertisement, precipitated by a labor dispute even though the advertisement may "contain[] deceptive representation and inference" and is alleged to violate the Lanham Act.)

Given the broadly speech-protective edict of NLA § 4(e), interpreting that section to withdraw jurisdiction from the federal courts to issue speech-curbing injunctions unless there is a final decision *on the merits*—not preliminarily, on a probability of success basis—that there *was* fraud is the interpretation that best gives full expanse to the Congress' intention "to tak[e] the federal courts out of the labor injunction business except in . . . very limited cir-

circumstances." *Burlington No. R. Co., supra,* 481 U.S. at 441. And that rule is, in any event, dictated by this Court's First Amendment prior restraint cases, as we now show.

B. First Amendment Prior Restraint Doctrine: "Prior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights." *Nebraska Press Ass'n v. Stuart, supra,* 427 U.S. at 559; *see also Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419 (1971) ("[a]ny prior restraint on expression comes to this court with a 'heavy presumption' against its constitutional validity."). "A prior restraint . . . has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time." *Nebraska Press Ass'n,* 427 U.S. at 559. And, "[t]emporary restraining orders and permanent injunctions—i.e., court orders that actually forbid speech activities—are classic examples of prior restraints." *Alexander v. U.S.,* 509 U.S. 544, 550 (1993).

The Ninth Circuit was of the view that the stringent prohibition upon prior judicial restraints of speech is inapplicable here, because "[t]he First Amendment does not protect fraud." *San Antonio Community Hospital,* App. 28a. But regardless of the label put on the speech here—false, fraudulent, injurious—the basis for the claim against it is that the speech is allegedly false.

This Court's cases make clear that although false speech is not protected as such by the First Amendment (*Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340 (1974)), the prior restraint doctrine nonetheless applies in two respects to speech that is *alleged* to be false, as it does to other allegedly unprotected speech.[11]

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[11] Labor dispute speech, like speech about public figures, is "false" for First Amendment purposes only if it is knowingly false or spoken with reckless disregard of the truth. *Letter Carriers v.*

First, there can be no injunctions against expression that has not yet taken place, whether that speech is alleged to be false or not. *Organization for a Better Austin v. Keefe, supra,* 402 U.S. at 418 (in the injunctive setting "the courts do not concern themselves with the truth or validity of the publication"); *Near v. Minnesota, supra,* 283 U.S. at 714 ("The preliminary freedom extends as much to the false as to the true.") For, "if there be time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy is more speech, not enforced silence. Only an emergency can justify repression." *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 97 (1977), *quoting Whitney v. California,* 274 U.S. 357, 377 (1927) (Brandeis, J. concurring).

The injunction in this case reaches not only the particular banner already displayed but *any* "advertisement or sign exhibited to the public, disparaging the purity of Plaintiff's product [and using the Budweiser trademark], and *expressly or impliedly representing by word, sign or action,* the false notion that the Van Nuys facility has a roden or *any other loathsome problem.*" App. 10a, emphasis supplied. So worded, the injunction censors in advance the publication of entirely new, heretofore unpublished signs or advertisement, reaching statements that have nothing to do with "rats"—of either the rodent or the labor relations epithet variety—and as to which the courts can only "speculate as to the effect of publication." *Pittsburgh Press v. Pittsburgh Commission on Human Relations,* 413 U.S. 376, 390 (1973); *see also Southeastern Promotions, Ltd. v. Conrad,* 357 U.S. 513, 558-59 (1975) ("It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable.") Under the

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Austin, supra; *Linn v. Plant Guard Workers, supra,* 383 U.S. at 58; *cf. New York Times v. Sullivan,* 376 U.S. 254 (1964).

branch of the prior restraint doctrine forbidding injunctions in advance of publication, then, the injunction in this case cannot stand.

Second, "another recurring theme in [this Court's] prior restraint cases" concerns "the requisite procedural safeguards" to avoid enjoining protected speech. *Alexander v. United States, supra*, 509 U.S. at 55. "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press*, 413 U.S. at 390. For that reason, that "mere probable cause to believe that a legal violation has transpired is not adequate to remove [expression] from circulation," *Fort Wayne Books, Inc. v. Indiana, supra*, 489 U.S. at 66, and, in particular, an injunction "based on a showing of probable success on the merits, . . . without a final determination" that the speech is in fact outside the First Amendment's protections cannot stand. *Vance v. Universal Amusement Co., Inc., supra*, 445 U.S. at 313.[12]

The procedural haste in this case resulted in exactly the evil the two strains of the prior restraint doctrine are designed to avoid: Because there was no evidentiary hearing, let alone a trial on the merits, and the speech was so precipitously enjoined, there was no way to determine whether, as the courts below assumed, passersby actually understood the Union's banner as asserting that there were rodents in the brewery; believed that assertion be-

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[12] Because the injunction in this case issued on a probable success basis, with no evidentiary hearing whatever let alone a plenary trial, and swept much broader than the banner the Union had already displayed, the question whether the First Amendment prior restraint doctrine permits an injunction against *particular* noncommercial speech on the ground of its proven falsity even *after* its initial publication and a trial on the merits is not presented. It bears noting, however, that this Court has never, so far as we are aware, approved such an injunction. *Cf. Kramer v. Thompson*, 947 F.2d 666 (3d Cir. 1991).

cause they saw it on a single sign in front of a brewery during a labor dispute; and therefore stopped buying Budweiser beer. Each of those suppositions is both highly unlikely and susceptible of proof at trial if true. And, even if those factual premises *were* ultimately proven, the speech enjoined is in any event almost assuredly *not* within the injunctive authority of the federal courts under the Lanham Act 1996 dillution amendments, or enjoinable as a common law fraud. *See* pp. 17-19, *supra*.

In short, this Court should grant certiorari because, as this case shows, the dangers of judicial interference in the determination of labor disputes and of judicial censorship through injunction are still very much alive and will remain so unless scrupulously avoided through the procedural protections imposed by Congress in the NLA, and by this Court in its prior restraint cases.

II. This Court Should Grant Certiorari and Exercise Its Independent Judicial Judgment to Conclude that the Union's Banner Is Fully Protected by the First Amendment.

Quite aside from the prior restraint doctrine, this Court has imposed a second procedural hurdle to judicial interference with freedom of speech: "Whenever it is claimed" —as in this case—"that a particular communication is unprotected" by the First Amendment, "the limits of the unprotected category, as well as the unprotected character of particular communications, have been determined by the judicial evaluation of special facts that have been deemed to have constitutional significance." *Bose Corp. v. Consumers Union of U.S., Inc., supra*, 466 U.S. at 505. This rule is one of "federal constitutional law," (*id.* at 510), and requires appellate courts, including this Court, to "conduct[] an independent review of the record . . . to be sure that the speech in question actually falls within the unprotected category . . ." (*id.* at 505). For,

> Providing triers of fact with a general description of the type of communication whose content is unworthy

> of protection has not, in and of itself, served sufficiently to narrow the category, nor served to eliminate the danger that decisions by triers of fact may inhibit the expression of protected ideas. [*Id.*]

In this case, the Ninth Circuit conducted no such independent review, but rather reviewed the record only for "abuse of discretion." Since the record consists only of the communication itself, the Ninth Circuit in fact deferred to the district court's conclusion that the communication, on its face, was unprotected under the First Amendment, rather than deciding that question for itself. The Ninth Circuit's deference to the district court on the question of First Amendment protection was improper, and the resulting conclusion—that the banner is on its face unprotected by the First Amendment—incorrect.

Over fifty years ago, this Court recognized that speech during a labor dispute is, as a general matter, entitled to the same solicitude as other speech on matters of "public concern":

> [S]atisfactory hours and wages and working conditions in industry and a bargaining position which makes these possible have [] importance. . . . The health of the present generation and of those as yet unborn my depend on these matters, and the practices in a single factory may have an economic repercussion upon a whole region and effect widespread systems of marketing. * * * Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society. [*Thornhill v. Alabama, supra,* 310 U.S. at 104-105.]

And such speech is entitled, in particular, to the special judicial review, accorded other speech concerning public affairs, "of the facts to insure that the speech involved is not protected under federal law." *Letter Carriers v. Austin, supra,* 418 U.S. at 282.

In conducting such review, courts protect the right of speakers in labor disputes "to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means of making its point." *Id.* at 283. For, "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or "fascist' [or 'rats']—is not to falsify facts," (*Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 295 (1943)), and cannot, without more, be proscribed. In short, in labor disputes as in other debates and protests, "[e]xpression of . . . an opinion, even in the most perporative terms, is protected. . . ." *Letter Carriers v. Austin*, 418 U.S. at 284.

Applying these principles in *Austin*, the Court, reviewing the record, concluded that Jack London's definition of a "scab" is protected labor speech, albeit based upon "rhetorical hyperbole, a lusty and imaginative expression of . . . contempt." 418 U.S. at 286. Since "[o]ne of the generally accepted definitions of 'scab' is one who refuses to join a union," . . . calling workers who refuse to join a union scabs,'." cannot be unprotected speech, since it is "literally and factually true," albeit "an insult or epithet." *Id.* at 283.

So here: The union's message relies heavily on "rhetorical hyperbole," and uses another well-established "lusty and imagination expression of the contempt felt by union members"—the term "rat." As a glance at the photograph of the banner submitted to the district court (App. 1a) indicates, the banner's double meaning use of this metaphorical language was understandable by the reader of the banner as a whole.

The banner's shorthand message was that contractors who pay less than prevailing wages and benefits, and companies that employ them, are bad for the economy and

for the community.[13] The sensible reader of the banner, whether or not he or she understood fully this message, would at least conclude that the critical term, "rats," was being used in a play-on-words, and was *not* being used in the sense one might think by glancing at the first line alone. For, no one reading the words "LOCAL #209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S.," would believe that the Union had a labor problem because the Company was contracting with rodents.

At worst, then, the reader is likely to conclude—even if he or she is unfamiliar with the precise labor-relations meaning of the term "rat"—that the word is being used in its general anthropomorphic meaning, expressing the opinion that a particular person is untrustworthy, not as a reference to small, unpleasant four-legged animals, and that the Union was therefore suggesting—as indeed the Union was—that the Company had taken action detrimental to the community's interests.

The Union, in communicating its message, did of course play on the well-worn pejorative meanings of the term "rat." But that dual use of the term made the Union's labor dispute message more effective, and is itself as protected as any other imaginative use of language.

In short, as in *Austin*, the Union's message was "literally and factually true," albeit perjorative, metaphorical, and

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[13] The idea that higher wages, as opposed to lower ones, stimulate the economy by providing greater disposable income while contractors who do not pay prevailing benefits may increase hospital and other insurance costs for others is certainly not novel. *See, e.g.*, Consol, *Stock Answers and the Minimum Wage*, The San Francisco Business Times, Friday, July 19, 1996; Miller & Collins, *Growing Economic Fairness*, 26 Social Policy 41 (June 1, 1996); Cola, *Senate Office of Research, Internal Government Review Agencies*, 15-SUM Cal. Reg. L. Rep. 28 (1995) (discussing declining insurance coverage, rising insurance costs, and increasing cost shifting); Jerry, *Health Insurance Coverage for High-Cost Health Care: Reflections on the Rainmaker*, 26 U. Mem. L. Rev. 1347, 1354 (1996) (discussing cost-shifting).

hyperbolic, and therefore protected by the First Amendment. The district court and Ninth Circuit's various substantive and procedural defaults resulted in judicial censorship of constitutionally protected labor speech for an extended period of time, with a possibly determinative impact upon the outcome of the labor dispute that cannot be precisely calculated nor retroactively corrected. The imposition of the injunction in the early stages of the labor dispute therefore had precisely the distorting impact the statutory and constitutional procedural protections accorded speech during a labor dispute are intended to prevent.

This Court should grant certiorari to restore the role of independent record review, as well as the prohibitions upon prior and preliminary injunctive restraints, in assuring against such infringements of freedom of speech during labor disputes.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted and the judgment below should be reversed.

Respectfully submitted,

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APPENDIX A

Budweiser HAS RATS
IN THEIR BREWERY
LOCAL # 209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S.

APPENDIX B

[Filed Feb. 27, 1998]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 97-56305
D.C. No. CV-97-6419-JMI

ANHEUSER-BUSCH, INC.,
Plaintiff/Appellee,

vs.

CARPENTERS LOCAL 29,
an unincorporated association,
Defendant/Appellant.

Appeal from the United States District Court
for the Central District of California
James M. Ideman, District Judge, Presiding

Submitted: February 9, 1998 [*]

Before: PREGERSON, CANBY, and LEAVY, Circuit Judges.

MEMORANDUM [**]

This preliminary injunction appeal comes to us for review under Ninth Circuit Rule 3-3. We have jurisdiction under 28 U.S.C. § 1292(a)(1), and we affirm.

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[*] The panel finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

[**] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Our inquiry is limited to whether the district court has abused its discretion in granting the preliminary injunction or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *See Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996).

The record before us shows that the district court did not rely upon an erroneous legal pemise or abuse its discretion in concluding that appellee's showing of probable success on the merits and the possibility of irreparable injury was sufficient to warrant the preliminary injunctive relief. *See San Antonio Community Hosp. v. Southern Cal. Dist. Council*, 125 F.3d 1230, 1238-39 (9th Cir. 1997); *see also Chandler*, 83 F.3d at 1152. Moreover, we conclude that the court's factual findings regarding appellant's display of the controversial banner are not clearly erroneous. *See San Antonio*, 125 F.3d at 1239; *Chandler*, 83 F.3d at 1152. Thus, the district court did not err by concluding that the Norris-La Guardia Act does not deprive it of jurisdiction to issue the injunction. *See* 29 U.S.C. §104(e); *San Antonio*, 125 F.3d at 1238-39.

Accordingly, the district court's grant of a preliminary injunction is AFFIRMED.[1]

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[1] Appellant's request for judicial notice is granted.

APPENDIX C

[Filed Sep. 17, 1997]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV-97-6419 JMI (JGx)

ANHEUSER-BUSCH, INC.,
Plaintiff,

v.

CARPENTERS LOCAL 209, AFL-CIO,
Defendants.

ORDER GRANTING PRELIMINARY INJUNCTION

IT IS HEREBY ORDERED:

Plaintiff, Anheuser-Busch seeks a preliminary injunction to prohibit the Carpenters Local 209 from displaying a banner that uses the Budweiser trademark logo or making fraudulent statements about the purity of plaintiff's beer product. The banners in question are two 20 foot by 5 foot signs that read: in 12-inch letters "*Budweiser* HAS RATS"; in 6-inch letters "IN THEIR BREWERY"; and in 5-inch letters "LOCAL #209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S."

Upon consideration of the moving papers and the applicability of *San Antonio Com. Hosp. V. So. Cal. Dist. Carpenters,* No. 96-56124 slip op. 11497 (9th Cir. Sept. 8, 1997) (*withdrawing and replacing* opinion of June 4, 1997, at 115 F.3d 685), the Court issues a preliminary injunction against Defendant in the above-entitled action.

BACKGROUND

Defendant, Carpenter's Local 209 (hereinafter, "Union") is involved in a dispute with H.M.S., a contractor who employs two or three workers at Anheuser-Busch's Van

Nuys brewery. Budweiser replaced a union contractor with H.M.S. On August 5, 1997 the Union began displaying the two banners.

In August, Plaintiff sought and obtained a state court injunction prohibiting certain violent picketing activities, but failed to get an injunction to prohibit display of the banners. The Los Angeles Superior Court found that the word "rats" is subject to two meanings, one of which is a crude reference to the brewery and management. The court concluded that to "enjoin such free speech would be inappropriate under the circumstances."

On September 4, 1997, Plaintiff filed an Ex Parte Application for a Temporary Restraining Order in this Court, based on claims of infringement and dilution under the Lanham Act and fraud. On September 10, 1997, after careful review of the application and Defendant's Opposition, the Court concluded that jurisdiction is proper and issued a narrowly tailored temporary restraining order. The order halted Defendant's activities that violate the Lanham Act or constitute fraud.

DISCUSSION

I. Standard of Review

To prevail on a request for preliminary injunctive relief, the moving party must show either (1) a combination of probable success on the merits and the possibility of irreparable injury, or (2) that serious questions are raised and the balance of hardship tips sharply in its favor. *United States v. Odessa Union Warehouse Co-op,* 833 F.2d 172, 174 (9th Cir. 1987).

II. Jurisdiction

This action presents claims under the Trademark Laws of the United States, 15 U.S.C. §§ 1051-1127 and for common law fraud. This Court has jurisdiction under 28 U.S.C. § 1338. The state law fraud claim arises out of a

common set of legally operative facts and is properly pendant on the federal claims under 28 U.S.C. § 1367.

III. Norris-LaGuardia Act

A crucial issue before the Court is whether the Norris-LaGuardia Act (NLA) applies in this situation and if so, whether Plaintiff satisfied the requirements of the NLA.

NLA is an anti-injunction statute that prevents district courts from issuing any TRO or injunction "in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this Act." 29 U.S.C. § 101; *see San Antonio* at 11504. The NLA denies district courts jurisdiction to prevent union members from publicizing the existence of, or the **facts** involved in a labor dispute by any method **not involving fraud**. 29 U.S.C. § 104(e) (emphasis added).

In *San Antonio,* a case strikingly similar to the present one, a Ninth Circuit panel upheld a preliminary injunction issued by Judge Takasugi of the Central District. There, a local of the same union in the present case displayed in front of a maternity ward at a hospital, a sign stating in 12-inch letters, "This medical facility is full of rats" and in five inch letters "Carpenters L.U. 1506 has a dispute with Best Int. for failing to pay prevailing wages to its workers." Slip op. at 11501. Judge Takasugi found the banner deceptive and fraudulent, and issued an injunction in accordance with the strict procedural requirements of the Norris-LaGuardia Act (NLA).

Here, Defendants are not advertising facts; they are advertising falsehoods and their methods involve fraud. The parties' declarations establish that the brewery has no rodent infestation. Contrary to Plaintiff's reading of the case, *San Antonio* held that NLA governed that case even though the union's banner was fraudulent speech. *Id.* at 11504. It is clear that the Ninth Circuit intended NLA to apply, because their opinion goes on to analyze all six factors required for an injunction. Thus, NLA applies equally in the present case.

In addition to proof of fraud, the Ninth Circuit requires a district court to find the following facts to issue an injunction in any case "involving or growing out of a labor dispute." *Id.*; 29 U.S.C. § 107.

1) The unlawful acts have been threatened and will be committed unless restrained. 29 U.S.C. § 107(a). Defendants displayed their poster intermittently over the course of a month. The declarations of the parties and proffered testimony establish this element.

2) Substantial and irreparable injury will follow. 29 U.S.C. § 107(b). Plaintiff holds federally registered trademarks numbered 922,481 and 952,277 for its Budweiser brand products. Plaintiff extensively markets that brand throughout the United States. False statements regarding the purity of Plaintiff's consumable products will improperly destroy brand loyalty developed through extensive and continuous marketing campaigns.

In *San Antonio,* the trial court found irreparable injury. The Ninth Circuit discussed calculation of the damage from the rat banner, but concluded that it was impossible to measure. *Id.* The impossibility of quantifying harm is precisely why the Lanham Act provides injunctive remedies. 15 U.S.C. § 1116(a). Irreparable injury ordinarily follows when a business' reputation, the strength of their mark, and the intangible value of the mark are put in jeopardy. *Koppers Co., Inc. v. Krupp-Koppers GmbH,* 517 F.Supp. 836 (D.C.Pa. 1981). This is such a case.

3) The denial of relief would cause greater injury to the Plaintiff than granting the injunction will cause to the Defendant. 29 U.S.C. § 107(c). Here, Plaintiff suffers substantial harm, and an injunction would only cause slight inconvenience and insubstantial economic cost to Defendant. The cost to produce Defendant's existing banners and replacement banners is minimal.

4) Defendant has no adequate remedy at law. 29 U.S.C. § 107(d). Lanham Act cases are eligible for injunctions, damages, profits, and destruction of the infringing item.

Injunctive relief is the remedy of choice for trademark cases because there is no adequate remedy at law for continuing infringement. Lanham Act, 15 U.S.C. § 1116(a); *Century 21 Real Estate Corp. V. Sandlin,* 846 F.2d 1175 (9th Cir. 1988).

5) Public officers are unable or unwilling to provide adequate protection to Plaintiff. 29 U.S.C. § 107(e). Law enforcement and other public officials generally do not apprehend commercial tortfeasors. *See, e.g., San Antonio* at 11513. This Court finds that, as a matter of public policy, public officials do not provide this type of enforcement, absent court action. Plaintiff did provide notice to the Los Angeles Police Department, Labor Relations Division prior to the injunction hearing.

6) The proponent of the injunction has made every reasonable effort to settle the dispute. 29 U.S.C. § 108. Plaintiff is not a party to this dispute and lacks the ability to resolve the underlying dispute, even if it desired to do so. Anheuser-Busch is merely a secondary player in the labor dispute, because the Union's dispute is with H.M.S. Defendant's sign purports to advertise a dispute with H.M.S., but disparages Plaintiff's products.

This Court held a hearing on this matter on September 15, 1997. The parties addressed the applicability of Norris-LaGuardia Act, 29 U.S.C. §§ 101 et seq., and satisfaction of requirements therein, as necessary. The parties submitted declarations of proposed testimony immediately prior to the hearing. All of the proposed testimony related to perception of the sign and inferences drawn from the terms therein. The Court found no disagreement between the parties as to the underlying facts and the parties filed materially identical photographic exhibits depicting the banners. The Court's findings of fact and the documentary evidence submitted by the parties rendered the proposed live testimony cumulative.

Accordingly, this court finds facts sufficient that the NLA does not deprive this Court of jurisdiction. 29 U.S.C. § 107.

IV. Lanham Act and Fraud Claims

Factual Issues: From careful review of the photographic exhibits showing the banner, and reading with the declarations of the parties, the Court agrees with the Ninth Circuit and Judge Takasugi's ruling in *San Antonio*, and finds the banners deceptive. Notably, in *San Antonio*, after the injunction, the union changed the sign and Judge Takasugi found that it was no longer deceptive. Slip Op. at 11513.

The Union uses the term "rat" primarily to disparage plaintiff's product and drive away potential customers. The contention that most observers would read the "rat" sign and think of a labor dispute is disingenuous.

Likewise, the "Budweiser" trademark on the poster would not confuse a reasonable person to think that Anheuser-Busch endorses this banner or that Plaintiff is advertising a rodent problem. Therefore, the Court finds no likelihood of confusion regarding Plaintiff's trademark.

Legal Issues: The Lanham Act, 15 U.S.C. § 1114(a) requires that a party claiming infringement show a likelihood of confusion as to source, origin, or sponsorship to be entitle to relief. Because the Court finds no such likelihood, Plaintiff's claim for infringement would fail.

Section 43(C) of the Lanham Act provides for injunctive relief to prevent dilution of the distinctiveness of famous marks, regardless of any confusion. 15 U.S.C. 1125. A party establishes a dilution claim by showing a likelihood of injury to business reputation or a lessening of the capacity for the mark to distingiush goods or services. *Academy of Motion Picture Arts & Sciences v. Creative House Promotions, Inc.*, 944 F.2d. 1446 (9th Cir. 1991). As discussed above, Plaintiff adequately proved the threat injury to his trademark.

Plaintiff has shown probable success on the merits of the claims for fraud and dilution. Success on the infringement claim is unlikely.

ORDER

It is hereby ordered that Defendant and all persons acting by, through and in concert with them are enjoined from engaging in the following acts at or about Plaintiff's Van Nuys production facility: using Plaintiff's registered "Budweiser" trademark in an advertisement or sign exhibited to the public, disparaging the purity of Plaintiff's product, and expressly or impliedly representing by word, sign, or action, the false notion that the Van Nuys facility has a rodent or any other loathsome problem. Defendants are hereby enjoined from using the term "Rats" as they recently have in their banner display in front of Plaintiff's facility.

Defendants are free to publicize and advertising with blunt, intemperate, abusive, insulting, or imprecatory language, the existence of and truthful facts involved in their labor dispute.

IT IS SO ORDERED.

DATED: September 17, 1997

/s/ James M. Ideman
JAMES M. IDEMAN
United States District Judge

APPENDIX D

[Filed Sep. 10, 1997]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV-97-6419 JMI (JGx)

ANHEUSER-BUSCH, INC.,
Plaintiff,

v.

CARPENTERS LOCAL 209, AFL-CIO,
Defendants.

ORDER GRANTING TEMPORARY
RESTRAINING ORDER

ODER SETTING HEARING ON
PRELIMINARY INJUNCTION
MONDAY, SEPTEMBER 15, 1997

IT IS HEREBY ORDERED:

The Court is in receipt of Plaintiff ANHEUSER-BUSCH, INC.'s *Ex Parte* Application for a Temporary Restraining Order ("TRO"), filed September 4, 1997 and Defendant CARPENTERS LOCAL 209, AFL-CIO's opposition filed September 8, 1997. Upon review and consideration of the moving papers, and the applicability of *San Antonio Com. Hosp. V. So. Cal. Dist. Carpenters,* 115 F.3d 685 (9th Cir. 1997) the Court ISSUES a TRO against Defendant in the above-filed action.

It is hereby ordered that Defendant and all persons acting by, through and in concert with said party are

BEST AVAILA

restrained and enjoined from engaging in the following acts at or about Plaintiff's Van Nuys production facility: using Plaintiff's registered "Budweiser" trademark in an advertisement or sign exhibited to the public, disparaging the purity of Plaintiff's product, and expressly or impliedly representing by word, sign, or action, the false notion that the Van Nuys facility has a rodent or any other loathsome problem.

Defendants are hereby enjoined from using the term "Rats" as they currently have in their banner display in front of Plaintiff's facility.

The Court will hear oral argument on the merits of this matter on *Monday, September 15, 1997 at 1:30 p.m.* The parties may address the applicability of Norris-LaGuardia Act, 29 U.S.C. §§ 101 et seq., and satisfaction of requirements therein, if necessary.

This order is effective upon Plaintiff's filing an undertaking of security in the sum of $10,000.

IT IS SO ORDERED.

DATED: September 10, 1997

/s/ James M. Ideman
JAMES M. IDEMAN
United States District Judge

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APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96-56124

D.C. No. CV-96-04830-RMT

SAN ANTONIO COMMUNITY HOSPITAL,
Plaintiff-Appellee,

v.

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF CARPENTERS, an unincorporated association;
CARPENTERS LOCAL 1506, an unincorporated association;
DOES 1 THROUGH 100,
Defendants-Appellants.

ORDER AND OPINION

Appeal from the United States District Court
for the Central District of California
Robert M. Takasugi, District Judge, Presiding

Argued and Submitted
March 3, 1997—Pasadena, California

Filed September 8, 1997

Before: Jerome Farris, Alex Kozinski, and Thomas G. Nelson, Circuit Judges.

Opinion by Judge T.G. Nelson; Dissent by Judge Kozinski

ORDER

The opinion filed June 4, 1997, slip op. 6439, is hereby WITHDRAWN.

OPINION

T.G. NELSON, Circuit Judge:

Southern California District Council of Carpenters ("the Union") appeals the district court's issuance of a preliminary injunction restricting the manner in which the Union had displayed a banner purporting to publicize its labor dispute with Best Interiors, a subcontractor engaged in a construction project at San Antonio Community Hospital ("the Hospital"). The district court concluded that the Hospital had met the strict requirements for a preliminary injunction set forth in the Norris-LaGuardia Act ("NLA"), 28 U.S.C. §§ 101-115. We have jurisdiction under 28 U.S.C. § 1292(a). We affirm.

I. FACTS

The Union is currently engaged in an ongoing labor dispute with Best Interiors, a construction company, over Best Interiors' failure to pay its employees prevailing wages and benefits. Best Interiors is a subcontractor in an expansion project at the Hospital. There is no contract between Best Interiors and the Hospital. The Union concedes that it does not now have, and has never had, a labor dispute with the Hospital.

On June 21, 1996, the Union began displaying a banner near the Hospital's construction site and the entrance to the Hospital's maternity ward that was visible by passersby driving on San Bernardino Road in front of the Hospital and patients entering the maternity ward. The banner is displayed during the morning hours and is held by three retired members of the Union. In twelve-inch red capital

letters on two lines, the banner reads: "THIS MEDICAL FACILITY IS FULL OF RATS." Below those lines in five-inch red capital letters on two lines that appear just above the feet of the banner's holders, it reads: "CARPENTERS L.U. 1506 HAS A DISPUTE WITH [ ] FOR FAILING TO PAY PREVAILING WAGES TO ITS WORKERS." In the blank space, in two-inch black handwritten letters, the banner reads: "Best Int." [1]

On June 25, 1996, the Hospital filed unfair labor practice charges against the Union with the National Labor Relations Board ("NLRB"). During the NLRB investigation, there were several attempts to reach a negotiated agreement between the Union and the Hospital. After completing its investigation, the NLRB Regional Office determined that evidence could not support the Hospital's allegations, and the Hospital withdrew its charges.

On July 11, 1996, the Hospital filed this lawsuit in the district court, including various state tort claims and a federal claim for an unlawful secondary boycott under 29 U.S.C. § 187. On July 17, 1996, the Hospital filed a motion for a temporary restraining order which the district court denied on July 22, 1996, because the Hospital had failed to satisfy the requirements of the NLA.

On August 9, 1996, the district court held an evidentiary hearing on the Hospital's request for a preliminary injunction. After hearing the testimony of witnesses from both sides, the district court ruled that the Hospital had met the requirements for a preliminary injunction set forth in the NLA. The district court ordered that the Union's members "are hereby preliminarily enjoined from using the term, 'Rats,' as they currently have in their

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[1] At about the time the Union began displaying the banner, the banner's holders also began distributing a handbill to interested pedestrians which explained that "[a] rat is a contractor that does not pay all of its employees prevailing wages or provide health and pension benefits to all of its employees."

banner which they display in front of plaintiff San Antonio Community Hospital." This timely appeal followed.

II. DISCUSSION

Generally, the grant or denial of a preliminary injunction will be reversed only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact. *Does 1-5 v. Chandler*, 83 F.3d 1150, 1152 (9th Cir. 1996). *See also Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38, 45 (8th Cir. 1946) ("Since we conclude that the trial courts' findings against the appellants in this case on issues necessary to its power and jurisdiction to enjoin the appellees [under the NLA] are not clearly erroneous, the decree appealed from is affirmed."); *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co.*, 118 F.2d 615 (8th Cir. 1941). However, when a case involves free expression, "[w]e must make an independent examination of the whole record so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression." *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 282 (1974) (citations omitted). "While this duty has been most often recognized in the context of claims that the expression involved was entitled to First Amendment protection, the same obligation exists in cases involving speech claimed to be protected under federal labor laws." *Id.* We review issues of law underlying the district court's grant of a preliminary injunction *de novo*. *Chandler*, 83 F.3d at 152.

A. *Injunctions and the Norris-LaGuardia Act*

Under traditional legal standards, a moving party may become eligible to obtain a preliminary injunction by demonstrating "a combination of probable success on the

merits and the possibility of irreparable injury." *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174 (9th Cir. 1987). At the very least, "it must be shown as an irreducible minimum that there is a fair chance of success on the merits." *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1319 (9th Cir. 1994).

The NLA is an anti-injunction statute that prevents district courts from issuing "any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this Act." 29 U.S.C. § 101. The NLA denies jurisdiction to district courts to issue preliminary injunctions that would prevent union members from "[g]iving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method *not involving fraud or violence.*" 29 U.S.C. § 104(e) (emphasis added).

Therefore, in addition to satisfying the traditional requirements for a preliminary injunction and providing evidence of fraud or violence, the Hospital, as proponent of the preliminary injunction, was required to prove the following additional elements:

> 1) That unlawful acts have been threatened and will be committed unless restrained (29 U.S.C. § 107(a));
>
> 2) That substantial and irreparable injury to the Hospital's property will follow (29 U.S.C. § 107(b));[2]
>
> 3) That greater injury will be inflicted upon the Hospital by the denial of relief than will be inflicted upon the Union by the granting of relief (29 U.S.C. § 107(c));
>
> 4) That the Hospital has no adequate remedy at law (29 U.S.C. § 107(d));

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[2] This element duplicates the irreparable injury requirement under the traditional analysis.

5) That the public officers charged with the duty to protect the Hospital's property are unable or unwilling to furnish adequate protection (29 U.S.C. § 107(e)); and

6) That the Hospital has made every reasonable effort to settle the dispute (29 U.S.C. § 108).

Because the Union challenges the district court's conclusions with regard to all of these elements, we will address each element in turn.[3]

1. *Fraud and Unlawful Acts*

In addition to satisfying the strict requirements of the NLA, the Hospital must demonstrate "a fair chance of success on the merits." On the merits of what? Of one of the Hospital's substantive claims. The Hospital's complaint contained six damages claims: libel, trade libel, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, interference with contractual rights, and secondary boycott under section 303 of the Labor Management Relations Act ("LMRA") (29 U.S.C. § 187). Four of the six claims cannot form the basis for injunctive relief.

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[3] In its order granting the Hospital's motion for a preliminary injunction, the district court did not explicitly address the traditional "fair chance of success on the merits" elements, but did note that it had "considered the pleadings and other documents filed herein" in making its ruling. Though the Union offered only a cursory analysis of this element in its opposition to the Hospital's motion, it did state that "HOSPITAL has not shown that it has a substantial chance or success on the merits of its common law claims." (See Union's Memorandum of Opposition filed July 18, 1996, at pg. 15.) The Union's argument on this point is even less clear on appeal, and is formulated as an argument that the Hospital's state law claims are "preempted" because the banner is "literally and factually true." (Blue 25-27.) Though the question is close, we conclude that the Union has not waived its objection to the traditional "fair chance of success" requirement for a preliminary injunction, and we will therefore decide the issue.

The interference with prospective economic advantage and contractual rights claims are preempted by section 303 of the LMRA. *Local 20, Teamsters v. Morton*, 377 U.S. 252, 260-61 (1964). And an employer cannot seek injunctive relief from a secondary boycott under section 303; only damages are available. *Burlington Northern R.R. v. Brotherhood of Maintenance Way Employees*, 481 U.S. 429, 448 (1987) (because the NLRB has exclusive authority to seek injunctions under the National Labor Relations Act, "employers are not permitted to obtain injunctions of secondary activity."); *California Ass'n of Employers v. Building and Constr. Trades Council of Reno*, 178 F.2d 175, 178 (9th Cir. 1949) ("The [LMRA] did not give private litigants the right to obtain injunctive relief even in those situations where a suit for damages was allowed."). That leaves the Hospital's defamation claims as the only possible basis for the preliminary injunction.

Because the injunction must be predicated on the Hospital's defamation claims, the Supreme Court's decisions in *Linn v. United Plant Guard Workers of Am.*, 383 U.S. 53 (1966), and *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974), come into play. These cases stand for the general proposition that "libel actions under state law [are] preempted by the federal labor laws to the extent that the State [seeks] to make actionable defamatory statements in labor disputes which were published without knowledge of their falsity or reckless disregard for the truth." *Letter Carriers*, 418 U.S. at 273. We thus must decide whether the Hospital satisfactorily demonstrated a reasonable chance of meeting this standard at trial, commonly known as the *New York Times* "actual malice" standard. *See New York Times Co. v. Sullivan*, 418 U.S. 254 (1964). We hold that it did.

The Union disputes the district court's finding that the language contained on the banner is fraudulent. The

Union argues that the term "rat" has deep historical meaning in the context of labor disputes and should not be subject to injunction The Union contends that it was merely publicizing the facts of its labor dispute and its opinion that Best Interiors was a "rat contractor" for failing to pay its workers the prevailing wage. The district court concluded, however, that the *manner* in which the term "rat" was used on the banner was deceptive and misled "all persons exposed" to the banner "into believing that the banner is stating that plaintiff Hospital has a rodent problem."

The Union is correct that the NLA allows unions a great deal of latitude in their choice of language in the context of a labor dispute. The Supreme Court has noted that "labor and management often speak bluntly and recklessly, embellishing their respective positions with imprecatory language." *Linn*, 383 U.S. at 58 (citation omitted). The Court has also noted that "federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty if it believes such rhetoric to be an effective means to make its point." *Letter Carriers*, 418 U.S. at 283. The license to use inflammatory rhetoric during a labor dispute, however, is not unbridled under the NLA. Where, as here, a union's fraudulent language is directed at an entity with which no labor dispute exists, the NLA does not prevent a district court from exercising jurisdiction to issue an injunction prohibiting the fraudulent activity. *See Donnelly*, 154 F.2d at 45 ("[N]othing in the Norris-LaGuardia Act denies to the Federal courts the power to issue an injunction in an action growing out of a labor dispute where the evidence clearly establishes the requisite jurisdictional findings. Fraud and violence are as unlawful and as reprehensible in a labor controversy as elsewhere.").

The most natural reading of the Union's statement "THIS MEDICAL FACILITY IS FULL OF RATS" is that the Hospital has a rodent problem. This, the Union

concedes, is not true, nor has the Union ever believed it to be true. The Union argues, however, that the term "rat" has deep historical meaning in the context of labor disputes. Most dictionaries, the Union points out, define "rat" not only as a type of rodent, but also as an employer who fails to pay prevailing wages or a worker who works for substandard wages. Because Best Interiors was not paying its workers prevailing wages, the Union argues that its statement was both "literally and factually" true—the Hospital *was* "full of rats."

The Union relies heavily on the Supreme Court's conclusion in *Letter Carriers* regarding a union's use of the word "scab." There, the Court explained:

> It should be clear that the newsletter's use of the epithet "scab" was protected under federal law and cannot be the basis of a state libel judgment. Rather than being a reckless or knowing falsehood, naming the appellees as scabs was literally and factually true. One of the generally accepted definitions of "scab" is 'one who refuses to join a union," Webster's Third New International Dictionary (unabridged ed. 1961), and it is undisputed that the appellees had in fact refused to join the Branch.

Letter Carriers, 418 U.S. at 282-83. But the distinction between the union's use of the phrase "THIS MEDICAL FACILITY IS FULL OF RATS" in this case is patent. Nobody would have understood the union in *Letter Carriers* to be referring to the non-union workers as "crust[s] of hardened blood and serum over a wound," or "scabies of domestic animals." *See* Webster's New Collegiate Dictionary 1021 (defining "scab"). By contrast, the manner in which the Union used the term "rat" on its banner could cause most—if not all—readers to be misled into believing that the banner meant that the Hospital had a rodent problem. This is not true.

The same distinction can be drawn with regard to the other cases cited by the Union. In *Beverly Hills Food-*

land, Inc. v. United Food & Commercial Worker's Union, 840 F.Supp. 697, 705 (E.D. Mo. 1993), *aff'd*, 39 F.3d 191 (8th Cir. 1994), the court ruled that a union handbill entitled "Don't Help Feed the Rat" identifying Foodland as a "rat employer" was protected by federal labor law because the handbill's use of the word "rat" could not be construed as a misrepresentation of fact. "No one could read the handbill," the court explained, "and believe that the owner/manager of Foodland was actually a rodent animal." *Id.* at 705.

Likewise, in *BE & K Constr. Co. v. NLRB*, 23 F.3d 1459 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995), the court noted that it was not improper for a trade union publication to urge "solidarity" against BE & K and describe the company as a " 'rat' contractor." *Id.* at 1463. Again, in this context, the use of the term "rat" to describe the management side of the labor dispute was not deceptive or designed to mislead members of the general public. No reasonable reader would have believed, based on the newsletter, that the contractor was actually a four-legged rat. The same cannot be said in this case.

The problem with the use of the term "rats" in this case was not the mere use of the term, but the manner in which it was used. The district court found a high probability that members of the public would be and actually were deceived by the Union's use of the phrase "THIS MEDICAL FACILITY IS FULL OF RATS" in the banner. Based on our independent review of the record, we agree. The banner states in prominent lettering "THIS MEDICAL FACILITY IS FULL OF RATS." At no place in that phrase or in the entire banner does the Union identify Best Interiors as the "rat contractor." The term "rats" is directed at the Hospital, not the contractor with whom the Union has the labor dispute. The allegedly explanatory language on the banner is in letters less than half the size of the first statement and is located at the bottom of the banner just above the feet of the individuals holding it.

The words "Best Int." identifying the disputed contractor are smaller still, handwritten, and, as a result, difficult to read at best by drivers passing on San Bernardino Road.[4] The cases cited by the Union do not undercut the district court's conclusion that the manner in which that term was used in the chosen context was fraudulent, deceptive, and intended to mislead members of the general public into believing that the Hospital suffered from a sanitation problem.

We agree that "[e]xpressions of opinion, though inaccurate and even misrepresentative in character, obviously cannot be permitted to be made the basis ordinarily for injunctive process in a labor dispute." *International Ass'n of Bridge, Structural & Ornamental Iron Workers v. Pauly Jail Bldg. Co.*, 118 F.2d 615, 616 (8th Cir. 1941). We also agree that "[a]ccusations of unfairness against an employer normally will fall within this category" of opinion. *Id.* But in this case, the phrase "THIS MEDICAL FACILITY IS FULL OF RATS" cannot be construed as an opinion. It certainly is designed to grab the reader's attention, but only because it purports to be an expression of fact which, if true, would deter reasonable people from seeking medical care at the Hospital. The NLA was intended

> to leave the federal courts free to enjoin those permeative acts, falling within the term "fraud or violence," which an unsluggish public conscience and a healthy social order cannot soundly tolerate, even at the risk

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[4] The size of the lettering used by the Union is a factor in the determination of whether or not the Union's message was deceptive. In *NLRB v. San Francisco Typographical Union No. 21*, 465 F.2d 53 (9th Cir. 1972), the union picketed a neutral party with the object of persuading consumers not to purchase a certain "struck product." The NLRB determined that "the picket signs did not adequately identify the struck products, because such advertisements were too difficult for shoppers to read," and we held that "the union must accept the burden of properly identifying the [target of the strike]." *Id.* at 56.

> of thereby enabling one of the parties to tip the scales of the fundamental dispute.

Id. at 617. The language on the Union's banner crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentations of fact. *See Mercy Health Servs. v. 1199 Health and Human Serv. Employees Union*, 888 F. Supp. 828 (W.D. Mich. 1995) (holding television commercials "defamatory because they attempt to frighten Michigan residents into believing that [Mercy's hospitals] cannot deliver adequate care and comfort"). As in *Peel v. Attorney Regisration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 107 n.14 (1990), the "legal question" in this case "is whether a statement of . . . fact is nonetheless so misleading that it falls beyond the First Amendment's protections." The Union's assertion that the Hospital was full of rats is such a statement. On this evidentiary record, the Union's banner is fraudulent, there is a reasonable probability that the Hospital can successfully prove "actual malice," and the NLA did not deprive the district court of jurisdiction to enjoin the banner's display.

2. *Irreparable Injury and No Adequate Legal Remedy*

The district court heard evidence from several of the Hospital's employees that they spent a portion of their time explaining to patients and other employees that the Hospital was not actually infested with rodents. Though there is no indication that patients and Hospital employees remained confused and misled after they were told that the Hospital was not actually suffering from sanitation problems, the time spent by Hospital employees explaining the nature of the labor dispute and reassuring patients was time taken away from their ordinary administrative and medical care duties.

The Hospital also introduced evidence that its reputation and, consequently, its fund-raising ability had been impaired since the Union began displaying the fraudulent

banner. Potential contributors were less likely to donate funds to the Hospital if they believed the facility was actually infested with vermin and maintained unsanitary conditions. As another court recently noted: "The reputation of a hospital is difficult to restore once it has been tainted." *Mercy Health Servs.*, 888 F. Supp. at 838. We agree.

Finally, it is impossible to measure the number of potential patients who were deterred from seeking medical care at the Hospital due to their misunderstanding of the Union's banner because they are not available to be counted. Because the banner was located directly in front of the entrance to the Hospital's maternity ward, however, evidence from employees who worked in that area provided one reasonable measurement of the deterrence caused by the Union's conduct, demonstrating a statistically significant drop in maternity patients. Cathy Knittle, an Assistant Director of Business Services at the Hospital and the person in charge of the department responsible for admissions to the Hospital, testified that maternity preadmissions, a method of early registration for expectant mothers, had dropped by 200 patients per month since the Union began displaying the banner. This drop in maternity preadmissions is not insignificant.[5] The district court concluded that the Hospital suffered irreparable injury as a result of the Union's fraudulent activity and had no adequate legal remedy to redress the harm caused. Based on our review of the record, we agree.

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[5] The dissent faults our reliance on Ms. Knittle's testimony, calling it "not sufficient" evidence of substantial and irreparable injury. See dissenting op., at 11516. Had this been the only evidence of injury the Hospital presented to the district court, we might agree. However, the dissent overlooks the additional evidence presented by several Hospital employees regarding lost administrative time and damage to the Hospital's reputation and fund-raising ability. Taken together, this is sufficient evidence of substantial and irreparable injury.

3. *Balancing the Hardships*

The Hospital provided substantial evidence regarding the injury it sustained as a result of the Union's fraudulent conduct. The burden to the Union of clarifying its banner, however, is slight in light of the narrowness of the district court's injunction. Shortly after the district court issued its injunction in this case, the Union began displaying a second banner with twelve-inch red capital lettering alongside the first banner which reads: "BEST INTERIORS IS THE RAT CONTRACTOR." The Hospital filed an *ex parte* application to the district court, asking for a contempt citation, but the district court ruled that the injunction had not been violated because the Union had clarified the misleading nature of the term "rats." Due to the narrow scope of the district court's injunction and the ease with which the Union complied with its requirements, the Union has been burdened only slightly at best as a result of the injunction.

4. *Local Police*

The Hospital introduced evidence that administrators at the Hospital had contacted the local police department and were told that the police were unable to do anything about the banner. The Union contends that this testimony was hearsay and therefore inadmissible. The district court did not sustain the Union's objection, however, which was not raised until the end of the witness's direct examination. Therefore, the evidence was properly admitted and the untimely objection was waived.[6]

5. *Efforts to Settle the Dispute*

The Union argues in a footnote near the end of its opening brief that the Hospital introduced insufficient evidence

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[6] The Union also argues, for the first time on appeal, that the Hospital did not give the police department advance notice of the preliminary injunction hearing, as it is required to do by 29 U.S.C. § 107(e). This is incorrect. The Hospital served notice of the hearing to Chief Martin Thouvenell via Federal Express at least seven days before the hearing.

"to establish that it engaged in all reasonable efforts to settle the matter before seeking injunctive relief." At the evidentiary hearing, however, the Hospital introduced evidence that it had engaged the Union on a number of occasions in an effort to resolve this dispute before seeking an injunction. There is sufficient evidence in the record to support the district court's conclusion that the Hospital satisfied this element.

We emphasize the narrowness of our decision. The Union displayed a banner in front of the Hospital that included a prominent declaratory statement of fact which was so misleading as to be fraudulent. The NLA generally prohibits federal courts from issuing injunctions in labor disputes, but when a union engages in fraudulent activity, the Act does not deprive a court of the power to enjoin it. The district court in this case carefully crafted a narrow injunction that prohibited the fraudulent manner in which the Union used the term "rats," but did not prohibit the use of the term itself. The Hospital presented evidence to the district court that has convinced us that the strict requirements of the NLA are satisfied. As a result, the district court did not err in issuing a narrowly tailored preliminary injunction to prevent the Union from using the term "rats" in a fraudulent manner.

B. *Prior Restraint*

The Union argues that the district court's preliminary injunction amounts to an unconstitutional prior restraint on speech. This issue, however, is rendered moot by our resolution of the district court's jurisdiction under the NLA. We concluded above that the district court correctly found that the Union's display of the banner was fraudulent. The First Amendment does not protect fraud. *See Peel v. Attorney Registration and Disciplinary Comm'n of Ill.*, 496 U.S. 91, 107 n.14 (1990); *Gehl Group v. Koby*, 63 F.3d 1528, 1534 (10th Cir. 1995). As the California Supreme Court has noted: "The policy of this state which

characterizes the use of false or fraudulent statements in picketing as unlawful is within the permissible limits which a state may impose upon industrial combatants without impairing the right of free speech." *Magill Bros., Inc. v. Building Serv. Employees' Int'l Union*, 127 P.2d 542, 545 (Cal. 1942) (citing *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940)). We agree.

III. CONCLUSION

After considering the entire evidentiary record and all of the Union's arguments on appeal, we conclude that the district court did not abuse its discretion in issuing its narrowly tailored preliminary injunction prohibiting the Union's fraudulent activity because the Hospital satisfied the strict requirements of the Norris-LaGuardia Act. We therefore AFFIRM.

AFFIRMED.

KOZINSKI, Circuit Judge, dissenting.

Those who would enjoin speech concerning a mtter of public interest must bear a heavy burden, *see Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 419 (1971) ("heavy presumpion" of unconstitutionality), more so if the speech in question concerns a labor dispute. *See* Norris-LaGuardia Act, 29 U.S.C. § 104(e) (prohibiting injunctions of labor speech unless "involving fraud or violence"); *Marine Cooks & Stewards* v. *Panama S.S. Co.*, 362 U.S. 365, 369 (1960) ("[The NLA's] language is broad because Congress was intent upon taking the federal courts out of the labor injunction business . . . .").[1]

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[1] The banner here was used in prosecuting a labor dispute, and "rats" is a term of art which conveys a specific, nondefamatory meaning in that context. *See* maj. op. at 12144. In addition to rodents and police informants, the term refers both to contractors who pay less than the prevailing wage and to workers who accept such a wage. *See 2 The Compact Edition of the Oxford English Dictionary* 2418 (1st ed., 24 prtg. 1985); *Webster's Third New International Dictionary* 1884 (1981).

The Hospital here did not carry its burden of showing it will suffer a "substantial and irreparable injury." *See* 29 U.S.C. § 107(b). It's implausible to believe that anyone choosing what hospital to patronize, or whether to donate money, would make such a weighty decision on the basis of a fleeting glance at a picket sign during a drive-by. People ain't that dumb; they would investigate and discover the truth.[2] There is no proof that a single person was deterred by the sign from using the hospital or donating money—not a one. The evidence about the decline in maternity ward admissions is not sufficient, as there was no connection—temporal or otherwise—to the union's picketing; the decline started in April, but the sign didn't go up until late June.[3] Either there were a lot of clairvoy-

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[2] The truth here would have been easy to find as the union was passing out flyers explaining that "[a] rat is a contractor that does not pay all of its employes prevailing wages or provide health and pension benefits to all of its employees." As well, prospective patients or donors could have asked—and in fact did ask—hospital personnel for clarification.

[3] The decline was calculated based on a comparison between 1600 admissions in March 1996 and 1400 at the time of evidentiary hearing on August 9, 1996. The banner first went up on June 21, 1996 —almost three months after the benchmark date.

The *entire* record on the decline is the following testimony by the Hospital's Assistant Director of Business Services:

DIRECT EXAMINATION

Q. Since the banner has been up, have you noticed a decline of the number of preadmits to the Maternity Department?

A. Yes.

. . . .

I receive daily reports, and we are approximately 200 maternity patients.

Q. Downwards?

A. Yes.

CROSS-EXAMINATION

Q. And you say that statistically your report shows that the number of maternity patients has declined 200 over what, the month before or what, over what standard?

[Continued]

ant (but gullible) expectant mothers in Upland, California, or the decline had nothing to do with the union's banner.

This may not seem like a big deal. Who, after all, can object to forcing the union to change its banner so as to avoid even a small risk of deceiving the public? But ambiguity and flamboyance are often at the heart of political expression. Who, for example, can forget "Where's the Beef" from the 1984 Presidential campaign? But what if Senator Mondale been forced to say: "Where's the substance?" No one would have noticed or remembered.

So too with rats. Changing the sign may make it clearer, may avoid the smallest risk of confusion, but it saps the message of its vigor. *See Old Dominion Branch No. 496, Nat'l Assn. of Letter Carriers* v. *Austin*, 418 U.S. 264, 284-86 (1974) (use of the word "traitor" in a defiition of a union "scab" not the basis for a defamation action since used "in a loose, figurative sense" and was "merely rhetorical hyperbole, lusty and imaginative expression of the contempt felt by union members"). I don't believe courts are equipped—or even permitted—to evaluate such tradeoffs. Because the sign here was literally true, within an accepted meaning of the word used, I would quash the injunction and let the parties work out their differences in the marketplace—and in the marketplace of ideas.

* * * *

The majority now explains that the wrong the preliminary injunction was designed to prevent is a defamation covered by *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). From bad to worse: Not only is this the first case to affirm a labor injunction, it is the first ever (so far as I am aware) to uphold a preliminary injunction against

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[3] [Continued]

A. Statistically up until about March we had 1600 preadmits per month. We are down to 1400.

E.R. tab 11, at 77-79.

speech covered by *Sullivan*.[4] Because *Sullivan* speech always involves matters of public interest, I had assumed that damages after trial on the merits is the high water mark of available relief. An interlocutory injunction based on a "reasonable probability" of malice, maj. op. a 12153, is, by hypothesis, not based on "actual malice." *See* 376 U.S. at 279-80. Since labor speech enjoys even greater protection than ordinary speech, today's opinion will provide plausible support to those who seek prior restraints against allegedly defamatory newspaper and magazine articles, as well as television programs, plays and movies. Indeed, given the wafer-thin defamation claim here, and the paltry evidence of irreparable harm, getting a preliminary injunction against speech offensive to public officials and other VIPs may not be all that hard.

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[4] I know of only one other published opinion where such an injunction has even been issued, *Mercy Health Services* v. *1199 Health & Human Service Employees Union*, 888 F. Supp. 828 (1995). This case involved, perhaps not coincidentally, a labor dispute at a hospital.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 96-56124
D.C. No. CV-96-04830-RMT

SAN ANTONIO COMMUNITY HOSPITAL,
Plaintiff-Appellee,
v.

SOUTHERN CALIFORNIA DISTRICT COUNCIL OF CARPENTERS, an unincorporated association;
CARPENTERS LOCAL 1506, an unincorporated association;
DOES 1 THROUGH 100,
Defendants-Appellants.

Filed February 17, 1998

Before: Jerome Farris, Alex Kozinski, and Thomas G. Nelson, Circuit Judges.

ORDER: Dissent by Judge Reinhardt

ORDER

Judges Farris and T.G. Nelson voted to deny the petition for rehearing. Judge Nelson votes to reject the suggestion for rehearing en banc, and Judge Farris so recommends. Judge Kozinski voted to grant the petition for rehearing and votes to accept the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

REINHARDT, Circit Judge, with whom Judges PREGERSON, KOZINSKI, and TASHIMA join, dissenting from the failure to rehear en banc:

Once again I am compelled to express my deep regret that this court has failed to exercise its responsibility to rehear a case en banc.[1] By refusing to review the divided panel opinion, we become not only the first circuit court in the 66-year history of the Norris-LaGuardia Act to uphold a preliminary injunction against peaceful labor speech on the basis that the content of the message constitutes "fraud," but also the first circuit court in the 34-year history of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to uphold an injunction against speech subject to the First Amendment's "actual malice" standard. I would have thought that such an opinion would have disturbed the "uniformity of our decisions" or "involv[ed] a question of exceptional importance." Fed. R. App. P. 35(a); Ninth Cir. Rule 35(a). Apparently not, in the view of a majority of our active judges.[2]

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[1] *See also, e.g., Rendish v. City of Tacoma*, No. 96-36150, —— F.3d ——, 1998 WL 24311 (9th Cir. 1998) (Reinhardt, J., dissenting from failure to rehear en banc).

[2] I use the term "majority" for convenience. Because it requires an affirmative vote of a majority of active judges to take a case en banc, and we now have an even number of active judges (18 out of our authorized 28), it is possible in any given case in which we failed to go en banc that we evenly divide. I am not allowed to disclose the actual vote in this or any other en banc matter.

This case required en banc rehearing to overrule two fundamental errors in the majority opinion: (1) its disregard for the previously unchallenged rule that federal judges may not issue injunctions that operate as prior restraints on peaceful labor speech; and (2) its erroneous holding that a "labor dispute" does not exist when a union pickets a "secondary" employer. The second error contravenes the plain language of the Norris-LaGuardia Act, repudiates a determination deliberately made by Congress when enacting that law, and specifically reaffirmed by Congress 15 years later when enacting the Taft-Hartley Act, and, to top it off, creates a direct intra-circuit conflict with *Smith's Mgmt. v. IBEW Local 357*, 737 F.2d 788 (9th Cir. 1984).

I

The majority found, without citing a single case involving free speech in the context of labor disputes, or a single case involving free speech covered by *New York Times v. Sullivan*, that because members of the public could misinterpret the Union's banner as stating that the Hospital had a rodent problem, the language on the banner was "so misleading that it falls beyond the First Amendment's protections." 125 F.3d 1230, 1237 (9th Cir. 1997) (quotation omitted).[3] On that basis, it upheld an *injunction* against the union speech. As Judge Kozinski's dissent convincingly demonstrates, however, this decision is directly contrary to law. 125 F.3d at 1239-40 (Kozinski, J., dissenting). I briefly add to my able colleague's cogent analysis only in order to highlight the fact that a long

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[3] The Union's banner, which it displayed near the Hospital's construction site, read:

THIS HOSPITAL IS FULL OF RATS.

CARPENTERS L.U. 1506 HAS A DISPUTE WITH [Best Int.] FOR FAILING TO PAY PREVAILING WAGES TO ITS WORKERS.

The letters on the top line were 12 inches high, while the letters on the bottom lines were 5 inches high.

line of decisions by the federal courts leaves no doubt that the language on the banner falls well within the protections of the Norris-LaGuardia Act and the First Amendment—and that in no event can such speech be enjoined.

Because the Norris-LaGuadia Act's "fraud" exception is the same as the "actual malice" standard first enunciated in *New York Times v. Sullivan, see Linn v. Plant Guard Workers*, 383 U.S. 53, 58 (1965), the Supreme Court has made it perfectly clear that " 'the most repulsive [labor] speech enjoys immunity provided it falls short of deliberate or reckless untruth' " and, "[b]efore the test of reckless or knowing falsity can be met, *there must be a false statement of fact*." *Old Dominion Branch No. 49, Nat'l Ass'n of Letter Carriers*, 418 U.S. 264, 284 (1974) (quoting *Linn*, 383 U.S. at 63) (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)) (emphasis added). Moreover, since "[l]abor disputes are ordinarily heated affairs, . . . frequently characterized by bitter and extreme exchanges, countercharge, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions," *Linn*, 383 U.S. at 58, "federal law gives a union license to use intemperate, abusive, or insulting language *without fear of restraint*." *Letter Carriers*, 418 U.S. at 283 (emphasis added).

The Court has been no less emphatic in applying this standard. It stated over 50 years ago, in reversing a state court injunction of union picketing, that "to use loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or *'fascist'—is not to falsify facts*." *Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 295 (1943) (emphasis added). More recently, the Court held that a union's repeated references in newsletters to replacement workers as "scabs" "cannot be the basis of a state libel judgment"—let alone an injunction—because unions must be permitted to employ "rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by

union members towards those who refuse to join." *Letter Carriers*, 418 U.S. at 282-83, 286.

Until the majority's opinion, federal courts had consistently come to the seemingly obvious conclusion that the Court's pronouncements applied equally to the word "rat," another commonplace term in labor disputes—a term that refers to replacement workers and their employers. *See BE & K Const. Co. v. NLRB*, 23 F.3d 1459, 1463 (8th Cir. 1994) (protecting union's right to urge boycott against "rat" contractor); *Beverly Hills Foodland, Inc. v. United Food & Commercial Worker's Union*, 840 F. Supp. 697, 705 (E.D. Mo. 1993) (holding that handbill outside grocery store entitled "Don't Help Feed the Rat" was protected speech), *aff'd*, 39 F.3d 191 (8th Cir. 1994). This judicial conclusion finds direct support in the dictionary as well. *See* 2 The New Shorter Oxford English Dictionary 2480 (4th ed. 1993) (defining "rat" as "[a] worker who refuses to join a strike or who takes a striker's place"); Webster's Third New International Dictionary 1884 (1981) (same).

Notwithstanding the unequivocal precedent protecting speech like that used in the Union's banner (and even protecting the very term involved), the two-judge majority erroneously concluded that "the Union's banner crossed the line separating protected rhetorical hyperbole from unprotected fraudulent misrepresentations of fact," 125 F.3d at 1237. In holding that the Union's message was so far removed from the type of dialogue properly employed in labor disputes that it could be enjoined by a federal judge, the majority was plainly insensitive to the type of terminology long used in labor disputes and was simply wrong about the injunctive powers of the federal courts in the post Norris-LaGuardia era.

For starters, the banner used a well-established term and it stated the truth. It used the term "rats" in the precise manner the term is traditionally used in labor disputes and in the manner that the dictionary recognizes it

is used in such context. "Rats," contractors who are paying less than the prevailing wage and workers who are accepting such a wage, were "literally and factually" prevalent in the Hospital. That alone is enough to protect the speech from ordinary tort liability. *See Letter Carriers*, 418 U.S. at 283 (holding that usage of "scab" was protected because, as used in the labor context of the case, it was "literally and factually true"). It is far more than enough to protect it against a post-Norris-LaGuardia-Act injunction by federal judges. Moreover, the union's conduct was hardly recklessly misrepresentative. Lest any readers of the banner be confused by the meaning of the word "rats" in the banner's context, the word was immediately followed by the Union's name and an explanation that a labor dispute was occurring. And, just to be sure, union members were passing out flyers explaining that "[a] rat is a contractor that does not pay all of its employees prevailing wages or provide health and pension benefits to all of its employees." 125 F.3d at 1239 n.2. To read, as the majority did, the first sentence of the banner entirely out of context and conclude that it was recklessly "false" ignores entirely the context of circumstances in which speech must be understood. *See Ironworkers v. Pauly Jail Bldg. Co.*, 118 F.2d 615 (8th Cir. 1941) ("Expressions of opinion, though inaccurate and even misrepresentative in character, obviously cannot be permitted to be made the basis ordinarily for injunctive processes in a labor dispute"). Even worse, it quashes unions' well-established right to use "lusty and imaginative" words in a "loose, figurative," sense. *Letter Carriers*, 418 U.S. at 284. The majority opinion would certainly not permit or encourage "robust speech."

Only unprotected "*commercial speech*"—i.e., "[f]alse, deceptive, or misleading, *advertising*," *In re R.M.J.*, 455 U.S. 191, 200 (1982) (emphasis added)—has ever been subjected to prior restraint. But speech regarding labor disputes is *not* commercial speech. *DeBartolo Corp. v.*

Florida Gulf Coast Bldg & Const., 485 U.S. 586, 576 (1988). Judge Kozinski is correct, therefore, in stating that "damages after trial on the merits is the high water mark of available relief," 125 F.3d at 1240, for defamation claims involving speech covered by *New York Times v. Sullivan*. Speech that is subject to that doctrine is, for all practical purposes, not subject to injunctive relief. *See Near v. Minnesota*, 283 U.S. 697, 718-19 (1931) (stating, over thirty years before *New York Times v. Sullivan*, that prior restraints on allegedly defamatory speech relating to public figures offend "the deep-seated conviction that such restraints would violate constitutional right" and that, for this reason, public figures "find their remedies . . . in actions" for damages, "not in proceedings to restrain . . . publication"); *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987) (stating that the settled rule, save a narrow exception not relevant here, is that "equity does not enjoin a libel or slander and that the only remedy for defamation is an action for damages").[4] That is why, until today, no court

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[4] The opinion's attempt to find authority to the contrary fails completely. Because the Norris-LaGuardia Act standard and the *Sullivan* standard have been around for 65 and 33 years, respectively, there is certainly no dearth of cases explaining the bounds of their application. Yet neither of the only two federal cases the majority cites in its "prior restraint" section that purportedly supports its revolutionary endorsement of the issuance of a preliminary injunction prohibiting controversial speech, *see* 125 F.3d at 1239, involves speech covered by either doctrine. Nor does either case even involve the question of an injunction, preliminary or otherwise. The first case the majority cites, *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990), involves the Bar's attempt to discipline an attorney who engaged in commercial speech by advertising his services as a "specialist." Even though the *Peel* speech enjoys *less* First Amendment protection than labor speech, the Court found, despite the likelihood that it would be misunderstood by some members of the general public, that the attorney's speech was *protected*. 496 U.S. at 106-07 & n.14. The Bar did not seek injunctive relief. The second case the majority cites, *Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995), serves it

has ever upheld an injunction prohibiting the type of speech at issue here.[5]

II

In its decision, the majority also stated, without citation to any authority, that "[w]here, as here, a union's fraudulent language is directed at an entity with which no labor dispute exists, the Norris-LaGuardia Act does not prevent district court from exercising its jurisdiction to issue an injunction prohibiting the fraudulent activity." 125 F.3d at 1235. Here, too, it is clearly wrong. There was indeed a "labor dispute" involving the hospital. In relying on the prohibited primary/secondary employer distinction in order to justify its affirmance of the injunction, the majority "commit[ted] precisely the error that prompted Congress to pass the [Norris-LaGuardia] Act," *Burlington No. R. Co. v. Maintenance Employees,* 481 U.S. 429, 442 (1987), totally ignored our decision in *Smith's Mgmt. v. IBEW Local 357,* 737 F.2d 788 (9th Cir.

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no better. It was a § 1983 suit for damages, and again no injunctive relief was sought. The "First Amendment" claim in that case was "one of vindictive prosecution" brought against police departments and officials for criminally charging the plaintiffs (under Colorado law) with lying in fund-raising efforts on behalf of their charity. *Id.* at 1534. The court affirmed a ruling of summary judgment in favor of the police on the ground of qualified immunity because the police "established that their conduct was objectively reasonable" and the plaintiffs failed to "produc[e] specific evidence" demonstrating an "unconstitutional motive" to burden legitimate solicitations. *Id.* at 1537.

[5] Even if the majority were somehow correct that the hospital had demonstrated a "reasonable probability," 125 F.3d at 1237, that the Union's banner was "deliberately and recklessly untru[e]," *Letter Carriers,* 418 U.S. at 284, such a finding could not justify imposing an injunction, preliminary or otherwise, on speech of this sort. "An interlocutory injunction based on a 'reasonable probability' of malice is, by hypothesis, not based on 'actual malice.'" *San Antonio Comm. Hosp.,* 125 F.3d at 1240 (Kozinski, J., dissenting).

1984), and contravened Congress' carefully crafted statutory scheme for dealing with "secondary boycotts."

There is no question that this case involves a "labor dispute" within the meaning of the Norris-LaGuardia Act. This court and the Supreme Court have stated in no uncertain terms that "in the Norris-LaGuardia Act, 'Congress abolished, for purposes of labor immunity, the distinction between primary activity involving the immediate disputants and secondary activity in which the employer disputants and the members of the union do not stand in the proximate relation of employer and employee.'" *Smith's Mgmt.*, 737 F.2d at 790 (quoting *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 623 (1967) (second internal quotation omitted)); *see also* 29 U.S.C. § 113(c) (defining labor dispute).[6] Indeed, in *Smith's Mgmt.* we held that a "labor dispute" existed where the circumstances were for all practical purposes identical to those present here. A supermarket hired a subcontractor that employed non-union labor to perform electrical work in the market. When the union distributed handbills outside the market in order to organize a secondary boycott of the market, the market obtained a preliminary injunction from the district court on secondary boycott grounds. This court forcefully vacated the injunction, holding that there was "no question" that a "labor dispute" could and did exist between the union and the supermarket within the meaning of the Norris-LaGuardia Act; that "the issuance of the injunction violated the Norris-LaGuardia Act;" and that the district court was without jurisdiction to issue any such order. *Smith's Mgmt.*, 737 F.2d at 790-92; *see also California Ass'n of Employers v. Building and Const.*

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[6] The Supreme Court, in fact, explained at great length in *Burlington No. R. Co.* that Congress intended the Norris-LaGuardia Act's definition of "labor dispute" to overrule *Duplex Printing Press Co. v. Deering*, 254 U.S. 443 (1921), which had held that unions were afforded less protection in activities aimed at "secondary" entities. *See* 481 U.S. at 438.

Trades Council, 178 F.2d 175, 179 (9th Cir. 1949) (holding that union had labor dispute with secondary employer).

As if this error were not bad enough, the opinion's reliance on the "secondary" employer issue threatens to undo Congress' carefully crafted statutory scheme for dealing with such issues. In 1947, Congress enacted a measure entirely separate from the Norris-LaGuardia Act to deal, *inter alia*, with the problem of "secondary boycotts," the Labor-Management Relations Act of 1947 ("LMRA") (popularly known as the Taft-Hartley Act), and, in so doing, specifically "rejected the proposal that the Norris-LaGuardia Act's prohibition against labor-dispute injunctions" be lifted in the case of such boycotts. *Northern Stevedoring & Handling Corp. v. International Longshoremen's & Warehousemen's Local 60*, 685 F.2d 344, 348 (9th Cir. 1982). Instead it created in the LMRA a separate and strictly limited procedure authorizing the National Labor Relations Board—and only the National Labor Relations Board—to seek injunctive relief due to any unlawful effects of secondary boycotts, and then only after certain specific administrative steps or procedures had been followed. *See, e.g., Bakery Sales Drivers Local 33 v. Wagshal*, 333 U.S. 437 (1948).

CONCLUSION

In 1960, the Supreme Court reaffirmed that in passing the Norris-LaGuardia Act, "Congress was intent on taking the federal courts out of the labor injunction business." *Marine Cooks & Stewards v. Panama S.S. Co.*, 362 U.S. 365, 369 (1960). I respectfully dissent from this court's failure to rehear en banc its unfortunate and unprecedented decision to get back into that business in order to regulate traditional, robust labor speech, in violation of the clear mandate of not only our national labor laws but of our fundamental First Amendment doctrine as embodied in *New York Times v. Sullivan*.

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) The Norris-LaGuardia Act, 29 U.S.C. § 101 et seq. provides, as here pertinent:

> **§ 101. Issuance of restraining orders and injunctions; limitation; public policy**
>
> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.
>
> **§ 104. Enumeration of specific acts not subject to restraining orders or injunctions**
>
> No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts: . . . .
>
> (e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the therat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection. . . .

§ 109. Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or included in said findings of fact made and filed by the court as provided in this chapter.

(b) The Lanham Act, 15 U.S.C. § 1125(c) and 1127 provide, as here pertinent:

§ 1125(c) Remedies for dilution of famous marks

(1) The owner of a famous mark shall be entitled, subject to the principles of equity and upon such terms as the court deems reasonable, to an injunction against another person's commercial use in commerce of a mark or trade name, if such use begins after the mark has become famous and causes dilution of the distinctive quality of the mark, and to obtain such other relief as is provided in this subsection. . . .

(4) The following shall not be actionable under this section:

(A) Fair use of a famous mark by another person in comparative commercial advertising or promotion to identify the competing goods or services of the owner of famous mark.

(B) Noncommercial use of a mark.

(C) All forms of news reporting and news commentary.

§ 1127. Construction and definitions; intent of chapter

The term "use in commerce" means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For purposes of this chapter, a mark shall be deemed to be in use in commerce—

(1) on goods when—

(A) it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and

(B) the goods are sold or transported in commerce, and

(2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in the United States and a foreign country and the person rendering the services is engaged in commerce in connection with the services.

(c) The First Amedment of the United States Constitution provides:

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and or petition the Government for a redress of grievances.

(2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CARPENTERS LOCAL 209,
Petitioner,

vs.

ANHEUSER-BUSCH, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Ninth Circuit correctly find that the District Court did not abuse its discretion in granting an injunction pursuant to the fraud exception of the Norris La-Guardia Act, enjoining the Union from displaying a banner outside of Anheuser-Busch's Van Nuys brewery, which stated, "Budweiser Has Rats In Their Brewery," a statement which would commonly be understood to mean that Anheuser-Busch's Van Nuys brewery has a rodent problem, and which the Union knew to be false?

Did the District Court and the Ninth Circuit correctly conclude that the Union's banner, stating that "Budweiser Has Rats In Their Brewery," and which was displayed outside Anheuser-Busch's Van Nuys brewery, was unprotected by the First Amendment, because the most natural reading of the statement is that Anheuser-Busch's Van Nuys facility has a rodent problem, a statement of fact which the Union knew to be false?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Carpenters Local 209 and Respondent Anheuser-Busch, Inc. Anheuser-Busch, Inc.'s parent company is Anheuser-Busch Companies, Inc. The only nonwholly owned subsidiary of respondent Anheuser-Busch, Inc. is Somerset Distributors, LLC.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Anheuser-Busch, Inc. ("Anheuser-Busch") respectfully submits this Opposition to the Petition for Writ of Certiorari by Carpenters Local 209 ("the Union"), for review of the judgment of the Ninth Circuit Court of Appeals in *Anheuser-Busch, Inc. v. Carpenters Local 209*, 9th Cir. No. 97-56305, entered on February 27, 1998.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Ninth Circuit, issued on February 27, 1998, is not reported, but is attached as Appendix B to the Union's Petition. The order of the United States District Court for the Central District of California, granting a preliminary injunction, issued on September 17, 1997, is unreported, but is attached as Appendix C to the Union's Petition. The District Court's temporary restraining order, issued on September 10, 1997, also is unreported, but is attached as Exhibit D to the Union's Petition.

JURISDICTION

Anheuser-Busch agrees with the Union's statement of jurisdiction.

STATUTES INVOLVED

1. The Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*, is set forth in Appendix G of the Union's Petition.

2. The Lanham Act, 15 U.S.C. §§ 1125(c) and 1127, is set forth in Appendix G of the Union's Petition.

3. The First Amendment of the United States Constitution is set forth in Appendix G of the Union's Petition.

STATEMENT OF THE CASE

This action grew out of the Union's dispute with H.M.S., Inc. ("HMS"), a small construction company that has two employees working at Anheuser-Busch's Van Nuys, California brewery. In furtherance of that dispute, the Union launched a smear campaign against Anheuser-Busch. On July 23, 1997, the Union began picketing in front of Anheuser-Busch's Van Nuys brewery. On July 24, 1997, Anheuser-Busch obtained a temporary restraining order ("TRO") in state court, which prohibited the Union from blocking brewery entrances and engaging in violence or other unlawful conduct.

Then, on approximately August 5, 1997, the Union stationed picketers in front of Anheuser-Busch's Van Nuys brewery, who manned two large banners, each of which were approximately 20 feet long and 5 feet tall. In very large 12-inch, bold-faced, red and blue letters, the banners stated, "Budweiser HAS RATS"; in 6-inch letters "IN THEIR BREWERY"; and in 5-inch letters not reasonably visible to the public passing by in their automobiles, "LOCAL #209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S." The word "Budweiser" was printed in the same style and color as the large Budweiser lettering displayed on the facade of the brewery, and which is a federally registered trademark. Petition, Appendix ("App.") A, 1a.

On August 6, 1997, Anheuser-Busch returned to the state court from which it already had obtained an injunction, and requested relief from the Union's use of fraudulent statements implying that there were rodents in Anheuser-Busch's Van Nuys brewery. The parties stipulated to a preliminary injunction continuing to regulate the Union's picketing, but the state court declined to enjoin the Union's use of the phrase, "Budweiser HAS RATS IN THEIR BREWERY."

On August 27, 1997, Anheuser-Busch filed a complaint in federal court, asserting federal causes of action for trademark infringement and trademark dilution, and a claim for fraud. On September 4, Anheuser-Busch requested that the District Court issue a TRO enjoining the Union from using the Budweiser trademark and the phrase, "Budweiser HAS RATS IN THEIR BREWERY." The court issued the TRO on September 10, 1997, and ordered a hearing on the preliminary injunction for September 15, 1997.

On September 15, 1997, both the Union and Anheuser-Busch appeared for the hearing and filed declarations and summaries of the witnesses' proposed testimony. Both sides also brought their witnesses to the hearing in the event that cross-examination or further testimony was necessary. Both the Union and Anheuser-Busch also submitted nonconflicting photographs of the Union's banner. *See* App. A In addition to the proposed testimony and photographs of the banner, Anheuser-Busch lodged a videotape with the court, containing statements of a Union member regarding the meaning and intent of the phrase "Budweiser HAS RATS IN THEIR BREWERY." The Union member stated:

> Rats eat Budweiser. They're going to love that, man. They're going to fucking love it. . . . Rats in the beer. That's going to go over like a ton of shit, pal. You take that to your fucking board members. Rats in the fucking beer.

The contents of the videotape also were summarized in the proposed testimony of Chris Harden, the Manager of Environmental Health & Safety assigned to Anheuser-Busch's Van Nuys facility.

At no time during the hearing did the Union ask the Court to hear testimony from its witnesses or to cross-examine Anheuser-Busch witnesses. Both parties proceeded based on the summaries of proposed testimony and documents that were filed before the hearing.

At the September 15, 1997 hearing, the District Court found that the Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.*

("NLA"), governed the case. Based on the undisputed evidence submitted by both sides, the District Court indicated that it had made all of the findings of fact required by the NLA.[1] Indeed, the court separately addressed each requirement, and so stated in its September 17, 1998 Order Granting Preliminary Injunction.

In issuing the September 17, 1998 Order Granting Preliminary Injunction, the District Court relied upon Ninth Circuit's recent decision in *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230 (9th Cir. 1997). In *San Antonio*, the Ninth Circuit upheld an injunction against the same union's use of a banner that used the term "rat" in the same manner. There, the banners read, "This Medical Facility is Full of Rats." *San Antonio*, 125 F.3d at 1232. The Ninth Circuit extensively analyzed the Union's use of the term "rat," and determined that it was fraudulent in that context. *Id.* at 1234-337.

In this case, the District Court issued an injunction similar to the one issued and affirmed in *San Antonio*. Here, the District Court ordered as follows:

> It is hereby ordered that Defendant and all persons acting by, through and in concert with them are enjoined from engaging the following acts at or about Plaintiff's Van Nuys production facility: using Plaintiff's registered "Budweiser" trademark

---

[1] In addition to a finding of fraud or violence, the District Court also had to have found that certain requirements of the NLA were met. Those prerequisites are that: (1) the court conduct a live hearing (29 U.S.C. § 107); (2) unlawful acts were threatened and would continue unless restrained (29 U.S.C. § 107(a)); (3) substantial and irreparable injury to Anheuser-Busch would follow (29 U.S.C. § 107(b)); (4) greater injury would be inflicted on Anheuser-Busch if the injunction were denied than would be inflicted on the Union if the injunction were granted (29 U.S.C. § 107(c)); (5) Anheuser-Busch has no adequate remedy at law (29 U.S.C. § 107(d)); (6) the public officers charged with protecting Anheuser-Busch were unwilling or unable to furnish adequate protection (29 U.S.C. § 107(e)); (7) Anheuser-Busch made every reasonable effort to settle its dispute with the Union (29 U.S.C. § 108); and (8) the District Court made findings of fact before issuing the preliminary injunction (29 U.S.C. § 109).

> in an advertisement or sign exhibited to the public, disparaging the purity of Plaintiff's product, and expressly or impliedly representing by word, sign, or action, the false notion that the Van Nuys facility has a rodent or any other loathsome problem. Defendants are hereby enjoined from using the term "Rats" as they recently have in their banner display in front of Plaintiff's facility.
>
> Defendants are free to publicize and advertis[e] with blunt, intemperate, abusive, insulting, or imprecatory language, the existence of truthful facts involved in their labor dispute. App. C, 11a.

After the court issued the injunction, the Union continued to publicize its labor dispute with HMS by displaying banners that stated "ANHEUSER-BUSCH HAS SCABS IN ITS BREWERY." Anheuser-Busch did not challenge the Union's use of those banners.

The Union appealed from the District Court's grant of the injunction. On February 27, 1998, a Ninth Circuit panel issued a *per curiam* opinion, affirming the District Court's grant of the preliminary injunction. The Ninth Circuit panel found that the District Court did not abuse its discretion in granting the preliminary injunction, or base its decision on an erroneous legal standard or clearly erroneous findings of fact. App. B, 3a-4a.

On June 27, 1998, the Union filed and served a Petition for Writ of Certiorari. On August 24, 1998, Anheuser-Busch received a letter from the Clerk of the United States Supreme Court, requesting that Anheuser-Busch file a response. Pursuant to Anheuser-Busch's request for an extension of time in which to file a response, Anheuser-Bush's response is due on September 28, 1998.

REASONS FOR DENYING THE PETITION

A. The Ninth Circuit's Order Is Nonprecedential.

The Ninth Circuit's order summarily affirms the District Court's order granting a preliminary injunction against the Union's banner display. The order does not explain in detail the basis for its ruling. App. B. The order cannot be cited to or relied upon by other courts in the Ninth Circuit (Ninth Circuit Rule 36-3), or by courts in other circuits. Moreover, this case intertwines a unique set of facts and legal issues that are unlikely to arise again in the same manner. Therefore, there is no compelling reason for this Court to use its sought after resources in a case so limited to its specific facts, and one in which the Ninth Circuit did not issue a published opinion.

B. The Ninth Circuit Applied The Proper Standard Of Review.

The Union suggests that the Ninth Circuit should have conducted an independent review of *all* of the District Court's factual findings, rather than adhering to the "abuse of discretion" standard of review which normally applies to preliminary injunctions. Petition, 24-25. However, where First Amendment issues are present, an appellate court's duty to conduct an independent review does not extend to all of the lower court's factual findings, but rather, is limited to constitutionally significant facts. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 414 n.31, 104 S. Ct. 1949, 80 L. Ed. 2d 502 (1984). In *Bose*, this Court explained the scope of an appellate court's independent review:

> There are, of course, many findings of fact in a defamation case that are irrelevant to the constitutional standard of *New York Times Co. v. Sullivan* and to which the clearly-erroneous standard of Rule 52(a) is fully applicable. Indeed, it is not

> actually necessary to review the 'entire' record to fulfill the function of independent appellate review on the actual-malice question; rather, only those portions of the record which relate to the actual-malice determination must be independently assessed. . . .

Bose, 466 U.S. at 514, n.31.

Thus, it is important to clarify at the outset that the Ninth Circuit indeed applied the proper standard of review to the District Court's various findings relating to the NLA prerequisites. *See Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38, 45 (8th Cir. 1946) ("Since we conclude that the trial courts' findings against the appellants in this case on issues necessary to its power and jurisdiction to enjoin the appellees [under the NLA] *are not clearly erroneous*, the decree appealed from is affirmed.") (emphasis added).

If the independent review standard applies in this case at all, it applies only to the facts which determine whether the Union's banner statement was constitutionally protected. In other words, the only factual determinations that could conceivably require a *de novo* review would be whether the Union's "rat" statement was false, and whether the Union made the statement with "actual malice" — that is, knowledge that it was false, or with reckless disregard for whether the statement was true or false. *See Bose*, 466 U.S. at 514, n.31. If the Ninth Circuit had conducted an independent review of these factual findings, it would, without a doubt, have reached the same conclusion that it did in its unpublished decision.[2] Therefore, regardless of the standard

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[2] The evidence on these issues was straightforward and undisputed. First, it is undisputed that the Union's "rat" statement had two meanings, one of which clearly was false. The evidence submitted to the District Court established that Anheuser-Busch did not have rodents in its Van Nuys brewery. *See also San Antonio*, 125 F.3d at 1236 ("[T]he manner in which the Union used the term "rat" on its banner could cause most — if not all — readers to be misled into believing that the banner meant that the Hospital had a rodent problem. This is not true.") In determining that the "rat" statement in this case was misleading, the District Court relied upon

(continued)

of review the Ninth Circuit applied, it would have reached the same conclusion.

C. The Ninth Circuit's Order Is Consistent With Federal Court Precedent Regarding The Granting Of Injunctions Under The Norris La-Guardia Act.

The Norris La-Guardia Act ("NLA") generally prohibits federal courts from issuing injunctions in cases involving labor disputes, "except in a strict conformity with the provisions of this chapter." 29 U.S.C. § 101. The NLA limits district courts' power to issue preliminary injunctions that would prevent unions from "giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method *not involving fraud or violence*." 29 U.S.C. § 104(e) (emphasis added). Therefore, in addition to satisfying the traditional requirements for a preliminary injunction, and providing evidence of fraud or violence, a party seeking an injunction in a labor dispute must prove additional elements. *See supra* note 1. Although these conditions are rigorous, when they are satisfied, federal courts have the power to grant injunctions in labor disputes.

Moreover, the courts and legislature explicitly have excluded unlawful conduct from the purview of the NLA so that federal courts may fashion injunctive relief which

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(fn. continued)
the Ninth Circuit's analysis of the same statement in *San Antonio.*

Second, upon an independent review, the Ninth Circuit easily would have determined that the Union made the "rat" statement with "actual malice." The Union never has contended that it believed there were rats in the Van Nuys brewery, even though that was a message it intended to convey. Evidence of the Union's knowledge and intent was contained in the videotape of a Union member's statement about "rats in the beer." *See also San Antonio*, 125 F.3d at 1236 ("The most natural reading of the Union's statement "THIS MEDICAL FACILITY IS FULL OF RATS" is that the Hospital has a rodent problem. This, the Union concedes, is not true, nor has the Union ever believed it to be true.")

balances both the state's interest in protecting citizens from malicious attacks and a union's right to peacefully and truthfully publish information regarding a labor dispute. *Oman Construction Co. v. International Brotherhood of Teamsters*, 263 F. Supp. 181 (M.D. Tenn. 1966).

In *Oman*, the district court held:

> *[N]orris-LaGuardia is not an unqualified prohibition against injunctions.* . . . [T]hese sections establish that Congress did not withdraw jurisdiction from the courts to grant injunctions in labor disputes but, instead, merely delineated those circumstances under which the remedy of injunction would or would not be available.

Oman, 263 F. Supp. at 183. *See also New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 562-63, 58 S. Ct. 703, 82 L. Ed. 1012 (1938) (by enactment of the NLA, "[i]t was intended that peaceful and orderly dissemination of information by those defined as persons interested in a labor dispute concerning 'terms and conditions of employment' in an industry or a plant or a place of business should be lawful; that, short of fraud, breach of the peace, violence, or conduct otherwise unlawful, those having a direct or indirect interest in such terms and conditions of employment should be at liberty to advertise and disseminate facts and information with respect to terms and conditions of employment, and peacefully to persuade others to concur in their views respecting an employer's practices.") (footnote omitted); *San Antonio*, 125 F.3d at 1235 ("The license to use inflammatory rhetoric during a labor dispute, however, is not unbridled under the NLA"); *International Ass'n of Bridge, Structural and Ornamental Iron Workers v. Pauly Jail Bldg. Co.*, 118 F.2d 615, 617 (8th Cir.) (with the NLA, Congress intended to leave the federal courts free to enjoin acts of fraud or violence), *cert. denied*, 314 U.S. 639, 62 S. Ct. 75, 86 L. Ed. 513 (1941); *Pocahontas Terminal Corp. v. Portland Bldg. and Constr. Trade Council*, 93 F. Supp. 217, 224 (D. Me.

1950) (the NLA does not deprive federal courts of the power to enjoin picketing involving fraud or violence).

Thus, in cases like this, where a party to a labor dispute communicates by fraudulent methods, the courts have authority to provide injunctive relief. In granting and affirming the preliminary injunction in this case, the District Court and the Ninth Circuit relied upon *San Antonio,* in which the district court issued and the Ninth Circuit affirmed a preliminary injunction enjoining fraudulent speech.

In *San Antonio*, the Ninth Circuit upheld an almost identical preliminary injunction against the same union, enjoining almost exactly the same banner statement. There, the Union displayed a banner near a hospital's maternity ward entrance, which stated: "This Medical Facility Is Full Of Rats." *Id.* at 1230. The Ninth Circuit extensively analyzed the Union's use of the term "rats," and found that "[t]he most natural reading of the Union's statement "THIS MEDICAL FACILITY IS FULL OF RATS" is that the Hospital has a rodent problem." *Id. at 1235.*[3]

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[3] In *San Antonio*, the Ninth Circuit easily distinguished other cases in which courts have found such terms as "scab" and "rat" permissible in the context of a labor dispute. Regarding *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin,* 418 U.S. 264, 283, 94 S. Ct. 2770, 41 L. Ed. 2d 745 (1974), in which the Supreme Court found that a union's use of the term "scab" could not be the basis for a libel judgment, the *San Antonio* Court stated:

> But the distinction between the union's use of the word 'scab' in Letter Carriers and the Union's use of the phrase 'THIS MEDICAL FACILITY IS FULL OF RATS' in this case is patent. Nobody would have understood the union in Letter Carriers to be referring to the nonunion workers as 'crust[s] of hardened blood—and serum over a wound,' or 'scabies of domestic animals.' See Webster's New Collegiate Dictionary 1021 (defining 'scab'). By contrast, the manner in which the Union used the term 'rat' on its banner could cause most — if not all — readers to be misled into believing that the banner meant that the Hospital had a rodent problem. This is not true. *San Antonio,* 125 F.3d at 1236.

The Ninth Circuit also pointed out the same distinction with respect to other cases in which unions have used the term "rat." In *Beverly Hills*

(continued)

Upon concluding that the Union's banner statement was fraudulent, the *San Antonio* Court then found that all of the procedural prerequisites of the Norris La-Guardia Act were satisfied, and affirmed the District Court's injunction. *Id.* at 1237-38. The District Court had ordered that the Union's members were "preliminarily enjoined from using the term, 'Rats,' as they currently have in their banner which they display in front of plaintiff San Antonio Community Hospital." *Id.* at 1233. The Ninth Circuit concluded that the District Court had crafted a narrow injunction that prohibited the fraudulent manner in which the Union used the term "rats," but did not prohibit the use of the term itself. *Id.* at 1238. Indeed, the Union later displayed a second banner alongside the original banner which identified the "rat contractor" as "Best Interiors." The court ruled that the second sign clarified the first sign, and that showing both signs in tandem did not constitute fraud. *Id.*

In this case, the District Court's and the Ninth Circuit's decisions are not only consistent with the Ninth Circuit's recent *San Antonio* decision, they also are consistent with the

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(fn. continued)
Foodland, Inc. v. United Food & Commercial Workers' Union, 840 F. Supp. 697 (E.D. Mo. 1993), *aff'd*, 39 F.3d 191 (8th Cir. 1994), the court ruled that a union handbill entitled "Don't Help Feed the Rat" was protected speech, because the use of the word "rat" could not be construed as a misrepresentation of fact. 'No one could read the handbill and believe that the owner/manger of Foodland was actually a rodent animal.' *San Antonio*, 125 F.3d at 1236 (*citing Beverly Hills Foodland, Inc.*, 840 F. Supp. at 705).

The *San Antonio* Court similarly distinguished the "rat" statement in *BE&K Construction Co. v. NLRB*, 23 F.3d 1459 (8th Cir. 1994), *cert. denied sub nom*, 513 U.S. 1076, 115 S. Ct. 721, 130 L. Ed. 2d 627 (1995). There, "the court noted that it was not improper for a union publication to urge 'solidarity' against BE&K, and describe the company as a 'rat *contractor*.' *Id.* at 1463." The *San Antonio* Court explained that, in this context, the use of the term "rat" to describe management was not deceptive or designed to mislead members of the public. "No reasonable reader would have believed, based on the newsletter, that the contractor was actually a four-legged rat. The same cannot be said in this case." *San Antonio*, 125 F.3d at 1236.

law in other circuits that have addressed similar issues. For instance, in *Mercy Health Services v. 1199 Health and Human Service Employees Union*, 888 F. Supp. 828 (W.D. Mich. 1995), Mercy Health Services ("MHS") sought and obtained an injunction against a union's dissemination of defamatory radio and television commercials. The union was involved in a labor dispute with one of MHS's hospitals in New York, but it broadcast commercials in Michigan, falsely stating that MHS hired inexperienced nurses, wasted money on conflicts with its nurses that could have been spent to provide better care, and recently caused 80% of its nurses to walk out, replacing them with inexperienced nurses. *Id.* at 830.

The district court granted a preliminary injunction, finding that the commercials were intentionally misleading because they failed to disclose that the labor dispute was not in Michigan. *Id.* at 835. Furthermore, the district court found that the commercials were defamatory, as they attempted to frighten Michigan residents into believing that MHS's hospitals in Michigan could not deliver adequate care, because they were staffed with untrained, inexperienced nurses. *Id.*

In enjoining the union's misleading statements, the district court found that the NLA did not prohibit it from issuing the injunction, because there was no labor dispute between the union and MHS. *Id.* at 837. However, the district court also rejected the union's First Amendment argument, because "in order to receive First Amendment protection, commercial speech must concern lawful activity and cannot be defamatory." *Id.* at 838. The Sixth Circuit denied a stay of the preliminary injunction. *Id.* at 831.

In a case from the Eighth Circuit, *Donnelly Garment Co. v. Dubinsky*, 154 F.2d 38 (8th Cir. 1946), the district court did not hesitate to find that a union's false statements made in the context of a labor dispute, were fraudulent. There, the union was alleged to have made false and malicious statements regarding working conditions at the Donnelly Company's plant. *Id.* at 42. The false statements were

publicized in advertisements throughout the country, and were made for the purpose of inducing customers of Donnelly to sever commercial relations with it, and thus to compel Donnelly to accede to the demands of the union. *Id.* at 43.

In *Donnelly*, the district court found the union's statements to be false, but could not enjoin them, because Donnelly failed to meet all of the prerequisites of the NLA. Specifically, Donnelly failed to show that the fraudulent acts committed in the past would continue into the future if not restrained. *Id.* at 43. However, in affirming the district court's denial of the injunction as not "clearly erroneous," the Eighth Circuit observed:

> Fraud and violence are as unlawful and as reprehensible in a labor controversy as elsewhere. But in an action for an injunction in a labor dispute the trial court is required to make certain findings as a prerequisite to the power and jurisdiction of the court to grant an injunction. . . . Since we conclude that the trial courts' findings against the appellants in this case on issues necessary to its power and jurisdiction to enjoin the appellees are not clearly erroneous, the decree appealed from is affirmed.

Id. at 45.

As the cases cited above demonstrate, when fraud is shown, and the NLA's prerequisites have been satisfied, courts can and should enjoin such conduct. The Union, however, portrays the Ninth Circuit's recent decisions in this case and in *San Antonio* as approval of "cavalier judicial suppression of speech" that will lead to a "downward spiral in the protection of labor speech." Petition, 13. But it is not surprising that the Ninth Circuit has twice affirmed injunctions under the NLA in a short period of time, because the statement and the context of the statement were almost identical in both cases. Both here and in *San Antonio*, the same union displayed the same banner statement, implying that

there were rodents in either a hospital, or a facility where consumable products are produced — both environments where cleanliness is paramount. The Union has cited no cases (and there are none reported), where any court has denied an injunction based on these specific and unique facts. Because both the Ninth Circuit's decisions in this case and in *San Antonio* are truly limited to their facts, it is difficult to imagine how either decision (especially the one in this case, since it is unreported) could be used to suppress constitutionally protected speech in other contexts.

In any event, the Ninth Circuit's unreported decision in this case is consistent with the law of the Ninth Circuit, as well as the law in the Sixth and Eighth circuits, the only other circuits that have addressed similar issues. Because the Ninth Circuit's decision in this case does not stray from established legal principles, this Court should deny the Union's Petition.

D. The Ninth Circuit Correctly Concluded That Anheuser-Busch Met All Of The Procedural Requirements Of The Norris La-Guardia Act.

The Union challenges the Ninth Circuit's approval of the District Court's findings on three of the NLA's requirements. First, the Union argues that the District Court did not meet the live-hearing requirement. Second, the Union claims that the District Court did not find that unlawful acts were committed and would continue unless restrained. Third, the Union asserts that the District Court incorrectly found that a greater injury would be inflicted upon Anheuser-Busch if the Union's banners were not enjoined than would be inflicted upon the Union by granting the injunction. Both the District Court and the Ninth Circuit correctly concluded that these three NLA prerequisites were satisfied.

1. The Ninth Circuit's application of the live-hearing requirement is consistent with the decisions of other federal courts that have addressed the issue under similar facts.

The Union asserts that the injunction issued in this case violates the NLA, because the District Court did not hear live testimony at the preliminary injunction hearing. Petition, 15. The Union makes this assertion despite the fact that it did not request the opportunity to present live testimony at the hearing. The Union also suggests that the federal courts of appeal are divided on the question of whether a district court's failure to conduct a live hearing is reversible error. Petition, 16 & n.8.

The Union is wrong on both counts. First, there is no split in the circuits. Rather, the cases in which appellate courts have reversed injunctions because of failure to satisfy the live-hearing requirement simply are factually distinct from this case. On the other hand, courts that have addressed the issue under facts similar to those present in this case consistently hold that the failure to hold a live hearing is not reversible error. The purpose of the live-hearing requirement, after all, is to ensure that courts issue injunctions "only after consideration of all the facts and arguments deemed important by the parties." *Drywall Tapers and Pointers v. Operative Plasterers' and Cement Masons' Ass'n.*, 537 F.2d 669, 674 (2d Cir. 1976), *cert. denied*, 444 U.S. 1073, 100 S. Ct. 1018, 62 L. Ed. 2d 755 (1980). In certain circumstances, such as when the facts are undisputed, or live testimony would duplicate evidence already submitted to the court, the objectives of the NLA are satisfied, and failure to hold a live hearing is not error.

The facts of *Drywall Tapers and Pointers* are illustrative. In that case, a union appealed from the district court's grant of an injunction on the ground that the district court did not comply with the NLA's live-hearing requirement. *Id.* at 674. The court of appeals upheld the injunction because, under the

circumstances of the case, live testimony was unnecessary. The court explained:

> The obvious purpose of the hearing requirements is to prevent grants of injunctions on ex parte applications and to ensure that relief follows only after consideration of all facts and arguments deemed important by the parties. In the present case, both sides submitted voluminous affidavits prior to . . . [the court's] decision. Appellants were obviously content to rest on that evidence, as they never requested a further hearing. Finally, the question of the validity of [a contract] was not a question that would be subject to greater elucidation by live testimony. . . . *Thus the documentary evidence presented to [the court] by both sides was sufficient to satisfy the hearing requirement and enable the court to decide whether an injunction should issue.*

Id. (emphasis added). *See also International Ass'n of Machinists & Aerospace Workers v. Panoramic Corp.*, 668 F.2d 276, 290-91 (7th Cir. 1981) (district court not required to hold live hearing because facts underlying request for injunctive relief were undisputed and employer's counsel did not request full evidentiary hearing); *Hoh v. Pepsico, Inc.*, 491 F.2d 556, 560 (2d Cir. 1974) ("a court might issue an injunction against [a party] without taking testimony if on the undisputed facts the balance tipped decisively in favor of the [other party] and the other criteria governing the issuance of injunctions were met."); *Railway Express Agency, Inc. v. Brotherhood of Railway, Airline and Steamship Clerks*, 437 F.2d 388, 395 (5th Cir.) (where resolution of the few disputed facts in favor of appellants would not affect the nature of the controversy, section 107 did not require an evidentiary hearing), *cert. denied*, 403 U.S. 919, 91 S. Ct. 2230, 29 L. Ed. 2d 696 (1971).

The cases the Union cites from the First, Fourth, Third and Sixth Circuits (Petition, 16, n.8), in which courts found

that a live hearing was required, involved disputed issues of fact, or situations in which district courts granted injunctions with no evidence at all. For instance, in *International Union UAW v. LaSalle Machine Tool*, 696 F.2d 452 (6th Cir. 1982), a live hearing was required to resolve disputed issues of fact. There, the district court granted a preliminary injunction, enjoining the employer from selling certain equipment which the union believed would result in loss of employment of its members. The injunction maintained the status quo pending arbitration of the issue. *Id.* at 454.

On appeal, the Sixth Circuit reversed the district court's order granting an injunction, because several procedural requirements of the NLA, including the live-hearing requirement, were not satisfied. However, the Sixth Circuit expressly stated that a live hearing was mandated in that case, precisely because there were factual disputes: "There was a clear issue of fact in this case as to whether sale of the machinery as proposed by the employer would inevitably lead to subcontracting of work contrary to the Letter of Understanding .... A hearing was required on this issue." *Id.* at 457. *See also United Telegraph Workers v. Western Union*, 771 F.2d 699, 765 (3d Cir. 1985) (reversing district court's order granting injunction because of failure to comply with prerequisites of NLA, including live-hearing requirement; because record contained clearly disputed facts, Third Circuit declined to decide whether exception to live-hearing requirement exists where there is no dispute).

In other cases the Union cites, the district courts based the injunctions on no evidence whatsoever. *See District 17, United Mine Workers of America v. A&M Trucking, Inc.*, 991 F.2d 108, 111 (4th Cir. 1993) (injunction vacated because of district court's failure to comply with prerequisites of NLA, including live-hearing requirement; the district court received *no evidence*, and heard *no witnesses*, but simply based its ruling on the in chambers argument of counsel) (emphasis added); *In Re District No. 1-Pac. Coast Dist., Marine Eng'rs' Beneficial Ass'n*, 723 F.2d 70, 74, 76 (D.C. Cir.

1983) (reversing district court's issuance of temporary restraining order, which actually amounted to a preliminary injunction prohibiting union from pursuing arbitration; district court failed to comply with prerequisites of NLA, including live-hearing requirement, and received no evidence, because it thought it was issuing a temporary restraining order, not a preliminary injunction); *Tejidos De Coamo, Inc. v. ILGWU*, 22 F.3d 8, 14 (1st Cir. 1994) (reversing district court's order granting a stay of pending arbitration proceedings, because none of the NLA requirements were met, but noting that district court did not make any factual findings because it believed it was staying an arbitration, not granting an injunction pursuant to the NLA; First Circuit also indicated that satisfaction of the live-hearing requirement was not necessarily required in all cases: "*There may be cases where one or another of these procedural requirements is waived or its omission is manifestly harmless*; but the lack of substantive findings cannot be so easily ignored.") (emphasis added).

In this case, the Ninth Circuit correctly concluded that all of the requirements of the NLA were satisfied, including the live-hearing requirement. The District Court based its factual findings on declarations submitted at the hearing, and summaries which contained the proposed testimony of the witnesses. In addition, all of the witnesses were present at the hearing in the event that live testimony was necessary. Most importantly, the evidence was undisputed, as both Anheuser-Busch and the Union submitted written evidence and photographs identically describing the banners. As the District Court stated in its order, it found "no disagreement between the parties as to the underlying facts and the parties filed materially identical photographic exhibits depicting the banners." The District Court concluded that its "findings of fact and the documentary evidence submitted by the parties rendered the proposed live testimony cumulative." App. C, 9a. The cumulative nature of the proposed testimony is underscored by the fact the Union itself, at the hearing, did

not request at any time the opportunity to present live testimony.

As the cases cited above demonstrate, the Ninth Circuit's decision in this case is consistent with the decisions of other circuits that have considered the live hearing issue under similar facts. Because the Ninth Circuit's decision merely follows established legal principles, the Supreme Court should not use its valued resources to consider this settled question of law.

2. Contrary to the Union's assertion, the District Court found, and the Ninth Circuit correctly affirmed, that unlawful acts had been committed and would continue unless restrained.

Rule 15.1 of this Court provides that "a brief in opposition to a petition for a writ of certiorari . . . should address any perceived misstatements of fact or law set forth in the petition." The Union asserts that the District Court did not find that any of the Union's acts were unlawful, but only that Anheuser-Busch demonstrated probable success on the merits of its claims for fraud and trademark dilution. Petition, 16. The Union is mistaken.

Indeed, the District Court independently addressed both the question of whether unlawful acts had been committed, and the separate question of probable success on the merits of Anheuser-Bush's claims. With respect to the first of these issues, the District Court explicitly found that "[t]hat unlawful acts have been threatened and will be committed unless restrained. . . . 29 U.S.C. § 107(a). Defendants displayed their poster intermittently over the course of a month. The declarations of the parties and proffered testimony establish this element." App. C, 8a.

3. The District Court also correctly found, and the Ninth Circuit properly affirmed, that Anheuser-Busch demonstrated probable success on the merits of its common law and trademark dilution claims.

Although the Union only indirectly challenges the Ninth Circuit's decision on the element of "probable success on the merits" (*see supra* Section D.2), Anheuser-Busch will briefly address that contention. Applying the proper abuse of discretion standard (*see supra* Section B), The Ninth Circuit explicitly found that "the district court did not rely upon an erroneous legal premise or abuse its discretion in concluding that appellee's showing of probable success on the merits and the possibility of irreparable injury was sufficient to warrant the preliminary injunctive relief." App. B, 4a. In any event, should this Court conclude that the Ninth Circuit should have reviewed the District Court's factual findings on this issue *de novo*, Anheuser-Busch submits that the Ninth Circuit would still have affirmed the District Court's decision.

(a) The fraud claim.

The Union makes much of the fact that Anheuser-Busch's original complaint labeled its common law claim as one for "fraud," even though it did not intend to state a common law cause of action for fraud. Petition, 17. As set forth in Anheuser-Busch's Answering Brief to the Ninth Circuit, the allegations of Anheuser-Busch's complaint make it clear that Anheuser-Busch's theory of liability is predicated upon the facts that the Union falsely represented to the public that Anheuser-Busch's Van Nuys facility was infested with rodents and, as a result of that false statement, Anheuser-Busch's business reputation was damaged. Those allegations

are the basis for a variety of torts.[4] The District Court found, and the Ninth Circuit correctly affirmed, that the Union's banner statements disparaged Anheuser-Busch's product and, therefore, Anheuser-Busch showed a probable chance of success on the merits of any claim where a finding of fraud is required.

(b) The trademark dilution claim.

The Union also challenges the District Court's finding that the Union's banner statement violated the Lanham Act, because it claims that its use of the Budweiser trademark was not a "commercial use in commerce." Petition, 17.[5] As was extensively briefed to the Ninth Circuit, the relevant case law supports Anheuser-Busch's position that the Union's use of the Budweiser trademark was "commercial" for purposes of the Lanham Act. Contrary to the Union's position, speech which occurs within the context of a labor dispute is not immune from the Lanham Act.

For instance, in *Brach Van Houten Holding v. Save Brach's Coalition*, 856 F. Supp. 472 (N.D. Ill. 1994), a coalition (which included a Teamsters local), used Brach's

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[4] For instance, "trade libel" is 'an intentional disparagement of the quality of property, which results in pecuniary damage.' *Aetna Casualty and Surety Co. v. Centennial Ins. Co.*, 838 F.2d 346, 351 (9th Cir. 1988). "Product disparagement" is an injurious falsehood that interferes with business. *Guess, Inc. v. Superior Court*, 176 Cal. App. 3d 473, 479, 222 Cal. Rptr. 79 (1986).

[5] On appeal to the Ninth Circuit, the Union argued that its use of the Budweiser trademark was "noncommercial," pursuant to the Lanham Act's "noncommercial use" exception. *See* 15 U.S.C. § 1125(c)(4)(B).

However, the Union never argued below the separate issue of whether its use of the Budweiser trademark was a use "in commerce." Therefore, the question is not properly before this Court. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981) ("question presented in petition but not raised in court of appeals is not properly before us"); *Youakim v. Miller*, 425 U.S. 231, 234, 96 S. Ct. 1399, 47 L. Ed. 2d 701 (1976) ('Ordinarily, this Court does not decide questions not raised or resolved in the lower court.').

trademark logo in its effort to prevent Brach's from closing one of its candy factories. *Id.* at 474. The coalition, calling itself "Save Brach's," submitted a proposal to save the factory, which proposed significant changes in management. *Id.* Brach's rejected the proposal and, seeking to enjoin Save Brach's from using Brach's logo, asserted trademark infringement claims under the Lanham Act. *Id.*

The court, while noting that the coalition's goals were laudable, still found that "Save Brach's activities clearly seem[ed] to be 'commercial activities' as contemplated by section 1125(a)(1)(A) [of the Lanham Act]." *Id.* at 474, 476. *See generally Edward J. De Bartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 576, 108 S. Ct. 1392, 99 L. Ed. 2d 645 (1988) ("We do not suggest that communications by labor unions are never of the commercial speech variety. . . ."); *Mercy Health Services v. 1199 Health and Human Service Employees Union*, 888 F. Supp. 828, 838 (W.D. Mich. 1995) (enjoining union from falsely publicizing in furtherance of a labor dispute, statements to the effect that hospital hired inexperienced nurses; declining to decide whether plaintiff had stated a claim under Lanham Act, but rejecting union's First Amendment argument because "*commercial speech* must concern lawful activity and cannot be defamatory.") (emphasis added).

As the case law indicates, use of a trademark within the context of a labor dispute may be "commercial" and, therefore, may be the subject of a claim for trademark dilution. Therefore, the District court properly found, and the Ninth Circuit properly affirmed, that Anheuser-Busch demonstrated probable success on the merits of its trademark dilution claim.

4. The Ninth Circuit correctly found that the District Court did not abuse its discretion in its balance of the hardships.

The Union also asserts that the Ninth Circuit, in upholding the District Court's injunction, applied the NLA fraud exception "exceedingly broadly," without giving weight to the fact that granting the injunction would harm the Union by "sap[ping] the message of its vigor." Petition, 19. The Union does acknowledge, however, that the injunction left it free to advertise its labor dispute. Petition, 19. As set forth below, the District Court's injunction was narrowly tailored to prohibit only the false statement that Anheuser-Busch's Van Nuys facility has a rodent problem. *See* App. C, 11a. Therefore, because the Union was not prohibited from publicizing its labor dispute, and had many alternate methods of communicating its message, the District Court properly balanced the hardships, and the Ninth Circuit correctly affirmed that assessment.

E. The Ninth Circuit's Order Does Not Violate The First Amendment.

The Union concedes, as it must, that false speech is not protected by the First Amendment. Petition, 21. That should end the matter, because the Union's banner statement, as it would most commonly be understood, is false. The District Court concluded that the Union's banner statement implied that there were four-legged rats in Anheuser-Busch's Van Nuys brewery. App. C, 7a. Another District Court, as well as the Ninth Circuit, previously determined that the same statement would most naturally be understood to mean that the facility had a rodent problem. *See San Antonio,* 125 F.3d at 1236. The statement, therefore, is undeniably false, because the Union never believed Anheuser-Bush's Van Nuys facility had a rodent problem. *See supra* note 2.

Having so concluded, the District Court did not reach the Union's First Amendment arguments, because the First Amendment does not protect fraud. *See San Antonio*, 125 F.3d at 1239 (prior restraint issue rendered moot by finding that Union's banner display was fraudulent, because "[t]he First Amendment does not protect fraud.") (citations omitted); *Castrol Inc. v. Pennzoil Co.*, 987 F.2d 939, 949 (3d Cir. 1993) (upholding injunction prohibiting false advertising; "[T]he prior restraint doctrine does not apply in this case because there has been 'an adequate determination that [the expression] is unprotected by the First Amendment.' ").

The Union's banner does not deserve more or less constitutional protection because it appeared in the context of a labor dispute. As the District Court correctly concluded, and the Ninth Circuit affirmed, the banner may be enjoined because it contains a false statement. As this Court has held, false statements of fact are not exempt from the limits of the First Amendment just because they are made in the context of a labor dispute. *See Linn v. United Plant Guard Workers of America*, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966).

In *Linn*, in the context of a union organizing campaign, this Court recognized that fraudulent or defamatory publications which occur in labor disputes are outside the protection of the First Amendment:

> [T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. But it must be emphasized that malicious libel enjoys no constitutional protection in any context. After all, the labor movement has grown up and must assume ordinary responsibilities. *The malicious utterance of defamatory statements in any form cannot be condoned, and unions should adopt procedures calculated to prevent such abuses.*

Id. at 63 (emphasis added).[6]

Moreover, courts also hold that injunctive relief may be the proper remedy for fraudulent speech, even when it occurs in the context of a labor dispute. In *Magill Brothers, Inc. v. Building Service Employees' International Union*, 20 Cal. 2d 506, 127 P.2d 542 (1942), the California Supreme Court held that neither the California nor the Federal Constitution proscribe an injunction which prohibits the fraudulent publication of information in a labor dispute:

> The policy of this state which characterizes the use of false or fraudulent statements in picketing as unlawful is within the permissible limits which a state may impose upon industrial combatants without impairing the right of free speech.

Id. at 512.[7]

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[6] *See also Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 600, 131 Cal. Rptr. 641 (1976) (relying upon United States Supreme court's statements in *Linn*; California courts only extend "constitutional protection to statements relating to labor disputes, so long as they are not made maliciously"); *Di Giorgio Fruit Corp. v. AFL-CIO*, 215 Cal. App. 2d 560, 568, 30 Cal. Rptr. 350 (1963) (parties to a labor dispute do not have Constitutional protection to make a "false and malicious statement."); *Emde v. San Joaquin County Cent. Labor Council*, 23 Cal. 2d 146, 154, 143 P.2d 20 (1943) ("Although the publicizing of the facts of a labor dispute in a peaceful manner is within the liberty of free discussion guaranteed by the Fourteenth Amendment to the United States Constitution, *a party to the controversy has no absolute privilege to discuss such matters so as to avoid civil responsibility for injury to another caused by a malicious and false statement made in the course of differences between them.*") (emphasis added).

[7] *See also Seven Up Bottling Co. v. Grocery Drivers Union*, 40 Cal. 2d 368, 374-75, 254 P.2d 544 (1953) ('[I]t appears to be settled that injunctive relief against picketing is available where the object sought to be achieved or the means used to achieve it are unlawful.'); *Hughes v. Superior Court*, 32 Cal. 2d 850, 854, 198 P.2d 885 (1948) ("[T]he right to picket peacefully and *truthfully* is one of organized labor's lawful means of advertising its grievances to the public, and as such is guaranteed by the Constitution as an incident of freedom of speech. Nevertheless, . . . the state may protect against abuses of the right; the object of concerted labor activity must be proper and . . . *must be sought by lawful means*, otherwise the persons injured by such activity may obtain damages or *injunctive relief.*") (emphasis added), *aff'd*, 339 U.S. 460, 70 S. Ct. 718, 94 L. Ed. 985 (1950).

Despite the abundance of legal authority which confirms that the Union's banner statement is not constitutionally protected, the Union still contends that courts cannot enjoin "allegedly" false speech that has not yet taken place, and courts cannot enjoin speech upon a showing of probable success on the merits. Petition, 23. Neither argument is compelling. First, for several reasons discussed below, the District Court's injunction was not a prior restraint. Second, the District Court did not base its injunction solely on a showing of probable success on the merits. It also found that the Union had committed the unlawful act of fraud, and would continue to do so unless enjoined. App. C, 8a. *See supra* Section D2.[8]

1. The preliminary injunction is not a prior restraint on speech, because the District Court issued it after the Union displayed its banner.

It is axiomatic that a prior restraint can only exist where the court seeks to repress a statement in advance of its publication. *Wilson v. Superior Court*, 13 Cal. 3d 652, 658, 119 Cal. Rptr. 468 (1975). The Union claims that the District Court's injunction was improper, because "there can be no injunctions against expression that has not yet taken place." Petition, 22. That is not what happened here. The District Court made no restriction prior to the publication of the Union's banner statement. Rather, the Union displayed its banner with the false "rat" statement for approximately a

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[8] In any event, the cases that the Union cites in support of this proposition are inapposite. Petition, 23. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63, 109 S. Ct. 916, 103 L. Ed. 2d 34 (1989) (discussing "probable cause" standard under Fourth Amendment for searches and seizures of allegedly obscene materials potentially protected by First Amendment); *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317, 100 S. Ct. 1156, 63 L. Ed. 2d 413 (1980) (holding that Texas public nuisance statute could not be used to prohibit motion picture exhibitors from exhibiting *named and unnamed* films, *without regard to the context* in which they were displayed).

month, and would have continued to display it, unless ordered by the District Court to stop. The injunction in this case sought only to enjoin the currently published and undisputedly false statement regarding the presence of rats in the brewery. The District Court's injunction allowed the Union the opportunity to continue to publicize its labor dispute using the term "rat," as long as the Union did not falsely imply that there were rodents in the Anheuser-Busch's Van Nuys brewery. Therefore, the District Court's preliminary injunction is not a prior restraint on speech.

2. The preliminary injunction is not a prior restraint because it is narrowly tailored to prohibit only the Union's use of the term "rats" as it had used it in its banner.

The District Court's order prohibited the Union from engaging in the following acts at Anheuser-Busch's Van Nuys facility:

> Using Plaintiff's registered "Budweiser" trademark in an advertisement or sign exhibited to the public, disparaging the purity of Plaintiff's product, and expressly or impliedly representing by word, sign or action, the false notion that the Van Nuys facility has a rodent or any other loathsome problem. Defendants are hereby enjoined from using the term "rats" as they recently have in their banner display in front of Plaintiff's facility. App. C, 11a.

The Union complains that the injunction prohibits it from engaging in *any* future disparagement of Anheuser-Busch's product, no matter how it is carried out. The Union's concern is more speculative than real. The order does not prohibit the Union from disparaging Anheuser-Busch's products, as long as it is done in a truthful manner. The injunction only enjoins the Union from representing the *false* notions that the Anheuser-Busch's Van Nuys facility has rats or any other problem affecting the purity of its product.

Thus, the District Court's injunction is narrowly tailored to eliminate only the specific harm alleged. *See Castrol Inc.*, 987 F.2d at 949 (injunction prohibiting false advertising upheld against First Amendment challenge; "The injunction is . . . not overbroad because it only reaches the specific claims that the district court found to be literally false.")

Indeed, the District Court's order specifically states that the Union "is free to advertis[e] with blunt, intemperate, abusive, insulting, or deprecatory language, the existence of and truthful facts involved in their labor dispute." The Union's replacement banner, stating that "Anheuser-Busch Has Scabs In Its Brewery," demonstrates that the Union easily complied with the Court's order, and continued to publicize its labor dispute. Because the District Court's order only prohibits the Union from making false assertions about the purity of Anheuser-Busch's product, but leaves the Union with many alternative methods of publicizing its dispute with HMS, the order is not unconstitutionally vague. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976) (zoning ordinance regulating location of theatres featuring "adult movies" characterized by "an emphasis on sexual matters" upheld against vagueness challenge because ordinance would not have a "significant deterrent effect" on films protected by the First Amendment).

3. The preliminary injunction is not a prior restraint, because it enjoins conduct, not speech.

In *R. A. V. v. St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992), the Supreme Court explained that certain forms of expression may be prohibited in an attempt to regulate conduct:

> Since words can in some circumstances violate laws directed not against speech but against conduct . . ., a particular content-based subcategory of a prescribable class of speech can be swept up

> incidentally within the reach of a statute directed at conduct rather than speech.

R. A. V., 505 U.S. at 389. Although the Court invalidated the statute in *R. A. V.*, it recognized that where a content-neutral regulation prohibits particular conduct, and is not specifically targeted at expressive speech, it is not a prior restraint. *Id.* at 390. *See also Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-49, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986) (zoning restrictions on adult movie theaters upheld in order to prevent urban blight, even though ordinances incidentally affected free speech issues), *reh'g denied*, 475 U.S. 1132, 106 S. Ct. 1663, 90 L. Ed. 2d 205 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) (where an injunction is designed to prevent a secondary effect of speech, traditional prohibitions against prior restraints will not prevent a court from issuing an injunction because "potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection.").[9]

The Ninth Circuit applied this concept in *Martin v. Reynolds Metals Company*, 224 F. Supp. 978 (D. Or. 1963), *aff'd*, 337 F.2d 780 (9th Cir. 1964). There, the plaintiff published a sign falsely stating that Reynolds' aluminum plant was poisoning his cattle. The court held that an injunction should issue, and that it was not a prior restraint because the defendant was publishing false statements which impinged upon the plaintiff's business reputation:

> The Supreme Court has held that the Constitution does not protect publications which are lewd, obscene, profane, or merely libelous from injunction. . . . Martin's avowed purposes for the sign are private and personal to publicize his lawsuit to compel Reynolds to do as Martin demands.

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[9] According to Professor Tribe, "regulations with only indirect or minor effects on speech are really not prior restraints at all." Tribe, *American Constitutional Law* (2d ed. 1988), p. 10511, n.37.

> The only logical, rational conclusion from the language of the sign is that *the language of the sign is libelous and tortious conduct not in the public interest or for the public interest. . . . [S]uch conduct is not a lawful exercise of free speech under the Federal Constitution and is indeed the very type of conduct which equity is well-equipped and ought to prohibit and protect against.*

Martin, 224 F. Supp. at 985 (emphasis added).

In this case, the District Court's order did not restrict the Union's speech on the basis of the content of the message. Rather, the injunction was narrowly tailored to prohibit the illegal conduct of fraud, while still allowing the Union to publicize its labor dispute. Therefore, the preliminary injunction is not a prior restraint on speech, but rather a prohibition on unlawful, fraudulent conduct.

CONCLUSION

For all of the foregoing reasons, Anheuser-Busch respectfully requests that this Court deny the Union's Petition for Writ of Certiorari.

Dated: September 28, 1998.

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No. 98-28

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CARPENTERS LOCAL 209,
Petitioner,

v.

ANHEUSER-BUSCH, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

Petitioner Carpenters Local 209 ("Union") responds to Respondent Anheuser-Busch, Inc.'s (Budweiser), Opposition to the Petition for Certiorari (Br. Opp.), filed September 28, 1998.

1. Budweiser concedes that the Ninth Circuit failed to conduct the independent review of the record required by *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), to determine whether the Union's statement was objectively false and, if so, whether the statement was made with knowledge that it was false or with reckless disregard for its truth. Br. Opp. at 6-7. Budweiser argues, however, that this error is harmless because the Ninth Circuit would necessarily have made these essential findings had it conducted a de novo review because "[i]n determining that the "rat" statement in this case was misleading, the District Court relied upon the Ninth Circuit's analysis of the same statement in *San Antonio*." Br. Opp. at 7 n.2.

In *San Antonio Community Hospital v. Southern California District Council of Carpenters*, 125 F.3d 1230

(9th Cir. 1997), *reh'g and suggestion for reh'g en banc denied*, 137 F.3d 1090 (9th Cir. 1998), however, the district court enjoined only the Union's original banner. As Budweiser itself states: "[T]he Union later displayed a second banner alongside the original banner which identified the 'rat contractor' as 'Best Interior.' The court ruled that the second sign clarified the first sign, and that showing both signs in tandem did not constitute fraud." Br. Opp. at 11. On this point, the court actually stated: "the injunction had not been violated because the Union had clarified the misleading nature of the term 'rats.'" *San Antonio*, 125 F.3d at 1238.

Thus, the *San Antonio* court's pronouncement that the banner language was misleading applies only to the original banner in that case, not to the supplemented language Union employed after the injunction issued. Here, in contrast, the *original* banner included the very clarifying identification that was *not* contained in the original *San Antonio* banner—"RAT CONTRACTOR H.M.S.— language which, when its was added, "clarified the misleading nature of the term 'rats.'" *See also* argument 5 below. Budweiser is therefore simply wrong in contending that, because the court here relied on *San Antonio's* reasoning, its failure to apply the proper standard of review was harmless error. The contrary is true since the supplemented banner in *San Antonio* was found not misleading. And, in any event, *this* Court, if it conducted the independent review mandated by *Bose*, would have to find that the statement on the Union's banner is fully protected by the First Amendment, for all the reasons spelled out in the Petition at 24-28.

2. Respondent' Brief in Opposition reads as if the district court enjoined, with the Ninth Circuit's approval, *only* "the Union's use of the phrase, "Budweiser HAS RATS IN THEIR BREWERY." Br. Opp. At 2, 3, 26-27. The injunction, however, reached not only the further use of the banner previously displayed but, in the language of the injunction, *any* "advertisement or sign "using the word "Budweiser" and "expressly or impliedly repre-

senting . . . the false notion that the Van Nuys facility has a rodent or *any other loathsome problem.*" Pet. App. 11a (emphasis supplied). Thus, the injunction restrained *in advance of their utterance* not only the precise statement already made but also other statements concerning issues having nothing to do with "rats" of either the rodent or labor variety, statements whose truth or falsity cannot possible have been judicially determined.

3. Equally unavailing is Budweiser's effort to minimize the Ninth Circuit's total disregard for statutory and constitutional protections accorded speech during a labor dispute by maintaining that the Union somehow acceded to the districts court's refusal to hold a hearing. Br. Opp. at 3, 19.

Immediately prior to the hearing on the preliminary injunction, both sides submitted, at the district court's request, declarations and summaries of *proposed* testimony, *not* given under oath and never offered into evidence. Obviously no opportunity existed to cross examine the proponent or offer opposing evidence.[1] At the hearing

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[1] Budweiser also *lodged* a videotape that it represented was of one individual union member discussing the banner here at issue. Br. Opp. 3. This tape was not before the court at the TRO stage. Like the rest of the submitted material it was never formally offered into evidence and never admitted. Since the videotape is not in the record, it could not have been relied upon by the district court or the Ninth Circuit, and there is no indication that it was. Budweiser's current attempt to rely upon the videotape does demonstrates the potential prejudice to the Union from the district court's failure to hold a live hearing, as required by the Norris-LaGuardia Act. Because there was no such hearing, the Union never had an opportunity to cross-examine the speaker or the individual authenticating the videotape regarding who the speaker was, the circumstances under which the tape was made—for example, whether it was before or after the actual banner was displayed—or the knowledge of the speaker regarding the banner's actual purpose or wording. Nor was the Union able to contest the admissibility of the hearsay videotape as an admission against the Union on the ground that Budweiser had not established "clear proof of actual participation in, or authorization of . . . or of ratification of such acts after actual knowledge thereof" as required by Section 6 of the NLA, 29 U.S.C. § 106, or to present any opposition testimony thereto. *See*

itself both sides appeared with witnesses and announced to the district court they were ready to proceed. In response, the district court announced "This proceeding is going to be short and sweet. I don't need to hear any evidence on the case. I'm convinced that the injunction should issue." ER 18, 3:17-20. In other words, the district court announced *at the outset* of the preliminary injunction hearing its refusal to permit a hearing that included "testimony of witnesses in open court (with opportunity for cross examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto" as required by § 7 of the Norris-LaGuardia Act ("NLA"), 29 U.S.C. § 107.

Petitioner immediately argued that "the strict procedural requirements of the Norris-LaGuardia Act maintain[] that the Court does not have jurisdiction to issue the TRO or an injunction unless that's been complied with" ER 18, 4:22-5:4. Petitioner's counsel continued: "I'm not waiving any of the arguments that we've made in our opposition. I'm not waiving any arguments in the brief that we filed earlier." ER 18, 5:17-20. The earlier pleadings had expressly argued that a live hearing was required before the court had jurisdiction to issue an injunction in a labor dispute. ER 6. The district court agreed that where was no waiver, responding "I just want to save you time because I've determined that it should issue. I agree that all of your arguments should be preserved." ER 18, 5:21-23.

In short, the Union *did* request a live hearing consistent with the NLA, but the request was overruled by the court before the hearing ever began. And there *were* relevant facts in dispute, as Budweiser's attempt now to rely on "facts" never established through testimonial evidence. The disputed facts include, for example, the visibility of the sign as a whole and such facts relevant to the necessary "actual malice" as whether the Union intended to

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United Mine Workers v. Gibbs, 383 U.S. 715, 736 (1966) (NLA clear proof requirement is "clear, unequivocal, and convincing proof.").

cause anyone to believe that the brewery was in fact infested by rodents, or simply intended to get the attention of passersby through use of the dual-meaning word "rat". Yet, there would have been no point—and the Union's lawyers would have risked contempt—had the Union repetitively raised the live hearing issue given that the district court had definitively ruled that it would not take any testimony.

4. Budweiser seeks to avoid a grant of certiorari here by maintaining that this case does not involve a serious intrusion into well-established free speech principles, and therefore is of no particular significance. But the Ninth Circuit has *twice* in rapid succession, in this case and in *San Antonio, supra*, upheld injunctions regulating in advance the content of union *pure speech—not* picketing—during a labor dispute. And the second injunction, the subject of this Petition, arises from a banner which, in both form and content, is even more clearly a use of "ambiguity and flamboyance" to provide "the message . . its vigor" than was the banner in *San Antonio*. Pet. App. 31a (Kozinski, J., dissenting in *San Antonio*.)

What is fundamentally at issue here, as Judge Kozinski forcefully maintained in his dissent in *San Antonio* (Pet. App. 32a), goes beyond these particular parties, and indeed beyond speech uttered during labor disputes. The fundamental concern is whether the "profound national commitment to the principle that debate on public issues [which includes labor disputes] should be uninhibited, robust, and wide-open" can survive the "chilling effect" of repeated *ex parte* single judge regulation and censorship. *See New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62 (1966).[2] The importance of this issue favors exercise of the Court's discretion to grant certiorari.

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[2] The *San Antonio* case has been asserted as a basis for injunctions against other union banners with completely different messages, *e.g., Edwards Circuits Theatres v. Southern California-*

5. Respondent's brief reads throughout as if the Union banner enjoined in this case did not contain its third line —"LOCAL #209 LABOR DISPUTE WITH RAT CONTRACTOR H.M.S." Br. Opp. At 2, 3, 26-27. This simplistic representation is entirely inaccurate.

Budweiser's only explanation for proceeding as if the banner had two lines instead of three is the assertion—without citation—that the third line was "not reasonably visible to the public passing by in their automobiles." Br. Opp. 2. But the photograph introduced into the record by the Union (Pet. App. 1a)—which was "materially identical" to the one submitted by Budweiser (Pet. App. 9a), and which Budweiser agrees is accurate (Br. Opp. 3)—does not support that conclusion. On that photograph, the third, *five-inch* high line is, as one would expect, just as visible as the second, *six-inch* high phrase "IN THEIR BREWERY." Pet. App. 1a.

Nor did the district court determine that the third line was not visible. Indeed, the district court could not have done so, since that court refused to "hear *any* evidence on the case." (ER 18, p.3, emphasis supplied) or to resolve any disputes in the declarations or proposed testimony. Instead, the district court expressly proceeded on the basis of "the documentary evidence alone"—that is, the photograph with a perfectly clear third line—in making its factual findings concerning the banner. Pet. App. 9a.

Since the injunction was not based on any finding that part of the banner was not legible, it could not have been upheld by the Ninth Circuit on that basis.

6. Budweiser seeks to justify this injunction by characterizing it as one that enjoins conduct, not speech. Br. Opp. at 28. This contention is absurd. The district

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Nevada Regional Council of Carpenters, Orange County Superior Court Case No. 798235 (filed August 14, 1998).

court's order does not purport to regulate or enjoin any "conduct," but is based squarely on the wording of the banner, nothing more. In particular, that order does not set time or place restrictions on the Union's use of its banner but rather entirely bars the use of particular language. Thus the injunction, far from regulating only a "secondary effect" (Br. Opp. at 29) of the Union's speech, censors the speech itself.

Budweiser and the *San Antonio* majority cite *Magill Bros., Inc. v. Building Service Employees' Int'l Union*, 20 Cal.2d 506, 127 P.2d 542, 545 (1942) as essentially their only authority that "false or fraudulent statements in picketing" are not protected by the First Amendment. *San Antonio*, 125 F.3d at 1239. *Magill* is inapposite both here and in *San Antonio* for picketing is not involved in either case. Both cases here involve injunctions against the peaceful and stationary display of a banner held by two stationary—here, sedentary—individuals. Actual picketing in this case ceased a week and a half before the beginning of the banner display.[3]

"[P]icketing is a mixture of conduct and communication and the conduct element often provides the most persuasive deterrent to third persons about to enter a business establishment." *DeBartolo v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 580 (1988) (internal quotation and citation omitted). Accordingly, "[i]ndustrial picketing is more than free speech, since it involves patrol of a particular locality and since the very presence of the picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Hughes v. Superior Court*, 339 U.S. 460, 464-465 (1950) (cita-

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[3] Based on these differences between banner display and patrolling with hand-held signs, the National Labor Relations Board General Counsel ruled that the *San Antonio* banner display and other similar baner displays do not constitute picketing, but are instead akin to handbilling and other forms of pure speech. ER 28.

tion omitted). Union speech during a labor dispute that does not involve picketing, in contrast, has been long understood as fully protected by the First Amendment. *DeBartolo*, 485 U.S. at 576.

7. Budweiser also maintains that the First Amendment prior restraint doctrine permits an injunction against an allegedly false statement because it "impringe[s] upon the plaintiff's business reputation." Br. Opp. at 29, citing *Martin v. Reynolds Metals Company*, 224 F. Supp. 978 (D. Or. 1963).[4] This contention has been squarely rejected by this Court.

Organization for a Better Austin v. Keefe, 402 U.S. 415, 418 (1971), stated emphatically that "the interest of an individual in being free from public criticism of his business practices in pamphlets and leaflets [does not] warrant use of the injunctive power of the Court." *Keefe*, 402 U.S. at 419-20. And this principal applies with regard to prior restraints against speech through an injunction whether the speech in question is false or true. *Keefe*, 402 U.S. at 418 ("the courts do not concern themselves with the truth or validity of the publication."); *see also Near v. Minnesota*, 283 U.S. 697, 714 (1932) ("The preliminary freedom extends as much to the false as to the true."); *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 225 (6th Cir. 1996) ("The private litigants' interest in protecting . . . their commercial self-

[4] Contrary to Budweiser's representation, the Ninth Circuit did not uphold the constitutionality of the district court's injunction in *Martin*, but dismissed the injunction appeal on procedural grounds. *Martin v. Reynolds Metals Company*, 336 F.2d 876 (9th Cir. 1964). Respondent's Ninth Circuit citation is to the decision upholding the district court's denial of defendant's motion to dismiss. *Martin v. Reynolds Metals Company*, 337 F.2d 780 (9th Cir. 1964). *See also Paradise Hills Associates v. Proceli*, 235 Cal. App. 3d 1528, 1541 (1991) (*Martin* "cannot be considered good law"); *Leonardi v. Shell Oil Co.*, 216 Cal. App. 3d 547, 572 (1989) (questioning the *Martin* court's rejection of "the majority American rule . . . that equity will not enjoin a trade libel").

interest simply does not qualify as grounds for imposing a prior restraint.")

More generally, this Court exercises extreme caution in regard to *all* injunctions against peaceful speech, stressing that before an injunction against pure speech can constitutionally issue "the gravity of the evil" condemned must be "demonstrated with the degree of certainty [the Supreme Court's] cases on prior restraints require." *Nebraska Press Ass'n v. Stuart,* 427 U.S. 539, 569 (1976). Applying this standard, the Court has, as far as we can determine, *never* upheld a prior restraint on speech involving matters of public concern on the basis of the harm the speech could cause. *See New York Times Co. v. United States,* 403 U.S. 713, 714 (1971) (refusing to uphold injunction against speech based on claims of breach of the national security); *Nebraska Press Ass'n, supra,* 427 U.S. at 568-570 (refusing injunction based on claims of infringement of Sixth Amendment right to a fair trial). The Union speech here was a matter of public concern. *See* Petition at 25-27 and n.13.

8. Budweiser *concedes* that the NLA requires that the district court determine in advance of issuing an injunction in a labor dispute that the union's acts *were* illegal, not just that they probably were. Pet. at 16; Br. Opp. at 19. Budweiser maintains, however, that the courts below applied the proper standard as to the legality of the Union's actions. Br. Opp. at 19. In fact, while the district court did find that the Union's actions were likely to continue (Pet. App. 8a: "Defendants displayed their poster intermittently over the course of a month"), on the merits of the legality of those actions the trial court held only that "[p]laintiff has shown probable success on the merits of the claims for fraud and dilution." Pet. App. 10a. The Ninth Circuit certainly so understood the district court's conclusions. Pet App. 4a: "the district court . . . concluded that appellee[] show[ed] . . .

probable success on the merits." Yet the Ninth Circuit did not reverse for failure to find that a Lanham Act violation or common law fraud actually occurred—findings which, as the Petition demonstrates, could not have been sustained. *See* Pet. 16-19.

CONCLUSION

Because the Ninth Circuit upheld, both in this case *and* in *San Antonio*, speech-censoring injunctions in blatant violation of well-established First Amendment and NLA principles this Court should grant certiorari and reverse the judgment below.

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